

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

THILDE CARDONER,
Appellant,
VS.

EENE R. DAY, ELEANOR DAY BOYCE,
WARD BOYCE, HARRY L. DAY, F. M.
THROCK, L. W. HUTTON, AUGUST
ULSEN, F. P. MARKWELL, C. A. MARK-
ELL, MARY SEAWELL MARKWELL, EFFIE
MARKWELL LOUBAUGH, ELIZABETH
MATH MARKWELL, EMMA MARKWELL,
CHANAN, BLANCHE DAY ELLIS, HARRY
ALLEN AND THE HERCULES MINING
COMPANY,
Appellees.

BRIEF OF APPELLANT.

ETIENNE DE P. BUJAC,
Carlsbad, New Mexico,

CHARLES R. BRICE,
Roswell, New Mexico,

FILED

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MATHILDE CARDONER,
Appellant,

vs.

EUGENE R. DAY, ELEANOR DAY BOYCE,
EDWARD BOYCE, HARRY L. DAY, F. M.
ROTHROCK, L. W. HUTTON, AUGUST
PAULSEN, F. P. MARKWELL, C. A. MARK-
WELL, MARY SEAWELL MARKWELL, EFFIE
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SMITH MARKWELL, EMMA MARKWELL,
BUCHANAN, BLANCHE DAY ELLIS, HARRY
R. ALLEN AND THE HERCULES MINING
COMPANY,
Appellees.

STATEMENT OF NATURE AND RESULT OF SUIT.

This suit was brought by Mathilda Cardoner against Eugene R. Day and the other defendants in this suit by bill in equity filed in the District Court of the District of Idaho, Northern Division, to cancel and rescind a certain deed dated 20th day of October, 1916, made by Mathilda Cardoner to Eleanor Day Boyce conveying to her an undivided one-sixteenth interest in certain mining properties fully set out in said deed, a copy of which appears at pp. 28-54 of the

record. Said deed also conveyed certain personal property and other property owned by The Hercules Mining Company. The principal property was an undivided one-sixteenth interest in what was known as the Hercules mine, together with other mines near or adjacent thereto, and a one-sixteenth interest in all property owned by The Hercules Mining Company, a copartnership, and certain lots in the towns of Burk and Murray, Idaho. Plaintiff also sued to remove the cloud upon plaintiff's title to said real property and to recover possession of said real and personal property.

Said cause was tried before Hon. Frank S. Dietrich, District Judge, and judgment given in behalf of the defendants, (appellees) on the 4th day of February, 1918.

Thereafter, the plaintiff Mathilda Cardoner, by her attorneys E. P. Bujac and C. R. Brice, filed a petition for appeal therein, which said petition was allowed on July 30, 1918, (Tr. p. 1402) fixing the appeal bond at \$500.

That on July 27, 1918, plaintiff filed her assignments of error (Tr. 1403), and likewise on the same date filed her appeal bond (Tr. 1411); praecipe for record was duly filed (Tr. 1413) and citations duly issued and served (Tr. 14-15). Orders were entered extending the time for the filing of record in this court until Dec. 25, 1918, as shown by the records of this court. The record was filed in this court on the 23rd day of December, 1918, and is now before this court for review of the judgment of the United States District Court of Idaho in said cause.

PLEADINGS.

Plaintiff filed her bill in equity in the United States District Court of Idaho June 4, 1917, alleging diverse citizenship and all necessary jurisdictional matters, and further that the plaintiff was the widow of Damian Cardoner who had lived prior to 1906 in Idaho, but since said date and

until his death had lived in Spain, plaintiff living with him. That during his lifetime he was a member of the mining partnership known as The Hercules Mining Company, the other partners being Eugene R. Day, Eleanor Day Boyce, Edward Boyce, Harry L. Day, Jerome J. Day, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loubaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis. That said partnership owned a number of mining claims, water rights and other property commonly known as the "Hercules Mine," and referred to by this name, and also the owner of valuable mills, smelters and refineries, stocks, bonds and other corporate issues, some held in the name of natural persons and corporations for the partnership, and that Damian Cardoner had owned a one-sixteenth interest in the partnership and partnership property.

That Damian Cardoner died in the Canary Islands Feb. 28, 1915, leaving the plaintiff and one daughter his only heirs, and that the Hercules mine and all property involved in this suit was community property of the said Damian Cardoner and plaintiff, the principal estate being the one-sixteenth interest in the Hercules Mine. That Eugene R. Day, the defendant, was appointed the administrator of the estate because of his familiarity with the values and properties of the Hercules mine; the order appointing him reciting that he was appointed because of his peculiar knowledge of mines and mine values, and particularly of the Hercules group. That the Probate Court of Shoshone county, Idaho, possessed of complete jurisdiction, entered an order settling the administrator's final account and decreeing final distribution on October 11, 1916, and by said decree said property was distributed to and decreed to be the property of the plaintiff, the widow of Damian Cardoner.

That plaintiff was 63 years of age, of foreign birth and unacquainted with the business customs of Idaho or the United States, that for several years she had been in bad health, suffering from asthma and nervous disorders superinduced by that disease; that during his lifetime Damian Cardoner managed the business affairs and property of the community of himself and plaintiff and never gave plaintiff definite information concerning its values or earnings; that at his death plaintiff knew nothing of the value or earnings of the partnership property aforesaid, having only a general impression that it was of considerable value and that the rents from it were large. That she knew Eugene R. Day had for a long time been the manager of the property and that his management had been successful, and believed his business capacity and integrity might be confidently relied upon, for which reasons she desired his appointment as administrator of the estate. After his appointment as administrator she sought to ascertain from him the value of the property and the average returns thereof but he evaded her inquiries and gave no definite information concerning the same; that during the administration only two dividends were paid by said mine, though the earnings would have warranted much more frequent and greater payments, and that the distribution of the profits were purposely postponed in order to mislead plaintiff as to the value and earnings of the mine. That on several occasions during administration Eugene R. Day inquired of plaintiff if she wished to sell her interest in the partnership property and she declined to consider a sale. In the latter part of October, 1916, one Henry R. Allen, acting under the direction of said Day and Eleanor Day Boyce, professing to speak purely as a friend of plaintiff, with intent to deceive her, stated to her that the Hercules mine was practically worked out, that it was a pure speculation whether any more ore would be discovered and that the Hercules mine did not pay any dividends for four

months when lead was high; that the Day family, who was in charge of the mine, were speculating in the metal market with the mine's money and would likely lose everything, that they were bucking the Guggenheims who had too much money for the Days and that the latter would be smashed. That the people in Spain claiming under her husband's will would likely cause her trouble and might come to this country and get her interest in the mine from her unless converted into cash, and urged plaintiff to sell her interest in the mine as speedily as possible, and if she did not do so her interest would be valueless.

That the said Allen, as a part of the scheme for procuring plaintiff's interest in the Hercules mine, figured out on paper that the mine was worth only \$5,000,000, all of which representations were false and untrue, and were made by Allen in behalf of his undisclosed principals, Eugene R. Day and Eleanor Day Boyce.

In consequence of said representations plaintiff was alarmed and believing she must speedily dispose of her interest in the mine or lose it, she thereupon told the said Allen to sell her interest in the Hercules property on the basis of \$5,000,000, which authority was reduced to writing October 27, 1916, authorizing the sale of her one-sixteenth interest for \$312,500.00 and her one-sixteenth interest in the cash on hand for \$37,500, and certain real estate in the town of Burk for \$20,000, making a total of \$370,000, the terms being \$50,000 cash and the balance in two weeks, no information being given her concerning any other property by the mining partnership and no other property was taken into account in fixing the price.

On October 28, 1916, Allen brought Eugene R. Day to close said contract; Day brought two checks, one for \$45,000 and one for \$5,000, which he gave plaintiff. He also brought the agreement of sale which had been signed by his sister Eleanor Day Boyce, and plaintiff thereupon signed

said agreement in the presence of Day. Allen and Day arranged with the vice president of a bank in Spokane to meet them there the next day and receive the escrow conveyance. Allen took plaintiff there the next day and went to the bank where Allen delivered in escrow to the bank the conveyance of such property, being the deed hereinbefore referred to, a copy of which is attached to plaintiff's bill marked "Exhibit A." At the bank Allen claimed the \$5,000 check for services to the plaintiff and asked her to endorse it, which plaintiff did, being too confused and bewildered to protest, she having regarded Allen as the representative of Day and not herself; that this was part of the scheme to make Allen appear as her representative in the transaction.

That this conveyance remained in escrow until November 14, 1916, when the balance of the purchase money was paid into the bank. Upon such payment the deed of conveyance was delivered by the bank to Day and Mrs. Boyce and by them placed of record in the Recorder's office in Shoshone county, Idaho, and they entered into possession of the property and have ever since been in possession thereof, claiming title, and the other defendants, members of said mining partnership, have ever since and do now recognize the claim of Day and Eleanor Day Boyce to be the owner of plaintiff's interest in said mining property and partnership, and to receive from it the profits which in equity belong to the plaintiff.

At the time of said transaction Allen was believed by plaintiff to possess exceptional opportunity by reason of his connection with mining operations to know the value of the mine and its prospects, and what was being done in its operation; she believed him to be a man of integrity and upon whose statements she might rely, and was influenced in making the sale by his representations. Also, plaintiff had entire confidence in Eugene R. Day and thought as manager

of the property, as partner of her husband and herself and as administrator of her husband's estate she might confidently rely upon his knowledge of values and upon his good faith in dealing with her.

That plaintiff believed and charges that the representations made by Allen were suggested by Eugene R. Day for the purpose of deceiving and alarming plaintiff and causing her to dispose of her interests in the mine at an inadequate price.

At the present time and time of said transaction and for several years prior thereto said Hercules properties were and are of the value of not less than \$20,000,000, and plaintiff alleges that said properties were and are of the reasonable value of \$30,000,000; that the mine was not exhausted nor were there any indications that it was or might be exhausted; that the ore bodies were better developed and more valuable than ever before; the price of metals was higher and the mine was earning more money at the time of the transaction than it ever had. Plaintiff does not know and can not ascertain the amount of cash on hand at the time of conveyance but is informed and believes that her one-sixteenth interest was greatly in excess of \$37,500. That had plaintiff known the real condition of the mine, its approximate value, the amount of money on hand and other property owned by the partnership and had not been deceived and frightened by Allen's false representations she would not have agreed to sell her interest therein and would not have executed said conveyance. At the time she executed said exhibit A that was read to her in the most casual manner; her attention was not directed to the provisions in said conveyance by which she conveyed her interest in all bills receivable notes, checks, bonds, mortgages and stocks and in and to any and all property of any name, character and description belonging to or owned by the company, whether standing in the name of the company or not.

She was lead to believe and did believe that the only property owned by the company was its mines, machinery and fixtures and cash on hand derived by its operations and not then distributed in dividends, and at the time of the decree of distribution to her by the Probate Court of Shoshone county, Idaho, she did not know that the general words used in that decree mentioning bills receivable, notes, bonds, etc., represented any property owned by the Hercules Mining Company or claimed by it other than its mines, equipment and cash on hand, and no explanation was made to her by the defendant Eugene R. Day or anyone else as to the meaning or significance of these words either in the decree of distribution to her, or in Exhibit "A" to this bill, and at the time of completing the sale she did not know and no one explained to her that the mining partnership owned any stock or other interest in any smelter or refinery, and she did not know and no one explained to her that the mining partnership had large quantities of ore in transit from the mines to smelters or refineries and on which payment had not been received and of which she, as a member of the mining partnership, was entitled to one-sixteenth interest.

That on October 28, 1918, and many years prior thereto Eugene R. Day had been the General Manager of the mining operations, and the marketing of the ores of this company and was conducting the operations under a salary paid him by the partnership, and was the agent of the several owners of the property and of the several members of the partnership, and on that date and for many years theretofore he had been and was an experienced mining man, capable of judging ore bodies and forming an opinion as to the probable permanency and probable value; as manager of the mine he was familiar with its every detail, with the extent of the ore bodies as they had been worked up to that date, with their value, with the cost of mining and treating, with the market demand for the ore, and with every element that

entered into a determination of the value of the mine as based upon its previous history. He had become familiar with the undeveloped ore bodies which had not yet been worked, with the appearance in situ of those ore bodies, with their probable permanency, with the then existing demand for the ore and the prevailing price, and with every element that entered into the probable future value of the mine. In said capacity he was familiar with the smelter at Northport in which the mining company had an interest, and with the refinery at Pittsburgh in which they had an interest, and prices paid by the mining partnership for these properties; with the advantages it gave to the partnership for the treatment of ores and the increased profits to be derived from treating the ores in the smelter and refinery, and he was familiar with the profits made by the partnership from said smelter and refinery. As administrator of the estate of plaintiff's husband he had likewise become familiar with the condition of her husband's affairs, with the possibility of some question being made as to her right to her husband's interest in the Hercules mine and mining partnership, and the general financial condition of her husband's estate, and what her business and financial conditions would be after closing the administration.

Plaintiff knew of his joint ownership with her in the mine and his position as manager of the partnership and knew that her husband and other members of the partnership had trusted him, and because of that trust she desired him to be administrator of her husband's estate, and as such administrator he had obtained her entire trust and confidence. During her husband's lifetime she had paid no attention to the business affairs, she trusted her husband implicitly in all these matters and received from him only such general information as he would happen to give her in the course of their general conversations. She had at no time any knowledge as to the different properties owned by said partner-

ship nor as to their ownership of any interest in the smelter or refinery, and had she known of same she would have had no knowledge as to the values. She had no knowledge as to the extent and profits of the operations of the partnership or what might probably be expected in the future operations. That at no time during the negotiations that led up to the contract of October 28, 1916, or at any other time did the defendant Eugene R. Day and Eleanor Day Boyce or any one else make any statement or disclosure to her or statement to her of any of the matters and things pertaining to the value of said mines and of the property owned by the mining partnership, or any statement or explanation as to their values, or as to their probable future values, or as to their probable future earnings, or any disclosure or explanation that in any way tended to disclose to her the value of her property rights in these mines and assets of the mining partnership, except the false and fraudulent statements hereinbefore alleged, and that the defendant Eugene R. Day well knew in respect to all these matters and things she did not have knowledge, and well knew had he disclosed to her the true values of these properties or condition, or disclosed to her all the properties the partnership owned plaintiff would not have executed to him the bill of sale, Exhibit "A."

That plaintiff did not discover the fraud practiced on her until December, 1916, and upon discovering it notified the defendants Eugene R. Day and Eleanor Day Boyce that they had obtained the conveyance of her interest in the Hercules mine by misrepresentation and fraud, and that she elected to rescind the transaction and would return the consideration and require a reconveyance of the property; that she had not withdrawn from the bank or used any of the purchase price paid for the conveyance, and on January 9, 1917, tendered to the defendants Eugene R. Day and Eleanor Day Boyce the \$370,000 paid into the bank by them, together with interest thereon, and demanded a re-

conveyance of the property. That they refused the tender and declined to reconvey. That the plaintiff has no desire to rescind the conveyance of the realty in the town of Burk, but if the transaction is deemed entire, or if the defendants require a rescission with respect to the Burke property, or if it is decreed by the court plaintiff stands ready to return the purchase price of such realty upon its reconveyance to her. That plaintiff is entitled upon rescission to the profits accruing to her interest in the partnership property from the payment of the last dividend to her, but she does not know the amount. She avers her readiness to do equity, to pay into court upon an accounting and order of the court therefor the entire purchase price paid by the defendants, with interest, or such part thereof, or such sum of money as the court may find proper to be paid, in order to do equity between the parties, and to do whatever other things may be meet and equitable to put the parties in the condition in which they were heretofore

Plaintiff can not ascertain without an inspection of the mining books of the partnership what the value of the mine is and its profits and the amount of money on hand at the time of the conveyance; that she can not discover what the several interests of the members of the partnership are in the one-sixteenth interest acquired from her, whether it was acquired for all the members of the partnership or for the members of the Day family, or for Eugene R. Day and Eleanor Day Boyce, or for Eugene R. Day individually. (Paragraph 9 of the bill, which it is deemed unnecessary to set out herein, asks for a discovery with reference to the interests of the partnership, and alleges other matters unnecessary, as we believe, to set out herein, and refer the court thereto for more specific detail.)

Plaintiff prayed for an accounting between the members of the partnership and an adjustment of the equities; for an accounting for the operation and profits of the mine, for

a rescission of the conveyance, and that all members claiming an interest in the property be decreed to reconvey to her her said interests. That there be ascertained what amount should be paid back by plaintiff on rescission and to whom it should be paid; that the court settle and adjust the equities between the parties to the transaction, and by its decree require each party to do whatever in equity should be done in the premises.

There was attached as Exhibit "A" to said bill the conveyance which it was sought to cancel and rescind. Also there was filed in said cause interrogatories Nos. 1 to 27 (Tr. pp. 56-51) to be answered by the defendants, the answers thereto appearing in the record at pp. 62 to 102 inclusive, the same being attached as exhibit to plaintiff's bill.

ANSWERS.

We do not find necessary for a proper understanding of this case to state the contents of any of the answers at length but refer to the record, except that we make the following general statements with reference thereto:

The defendants, and each of them, substantially deny all of the equities in plaintiff's bill; they deny any fraudulent intent on the part of Eugene R. Day, also the alleged false representations in connection with the sale of the Hercules mine, and substantially put in issue the allegations with reference to the alleged fraud, false representations and value of the mine and Hercules partnership property.

The answers of Jerome J. Day and Harry L. Day state they were innocent purchasers for value without notice of any fraud on the part of Eugene R. Day and Eleanor Day Boyce in the purchase each of an undivided one-fourth interest in the property conveyed by plaintiff to defendant Eugene R. Day, and that such purchase was made and the

purchase price paid before any of the contentions of plaintiff made in her bill were known to them.

All of the answers allege that the price paid plaintiff for the mine approximates a fair valuation thereof.

STATEMENT OF THE FACTS.

There are certain facts in connection with the transaction that are either not disputed or are admitted in the pleadings, among which are the following:

The plaintiff was 63 years old at the time of the trial in December, 1917, (Rec. p. 319); resided at Albuquerque, New Mexico, and had for a year previous to said date; went there for her health; that she and her husband left the State of Idaho for Spain (they had lived in this country for many years) in the year of 1906, where they had resided until her husband's death on the 28th day of February, 1915, (Rec. pp. 320-321); that from the year of 1906 until April, 1916, when she came to this country to look after her interests inherited from her husband, she had lived in Spain, (Rec. p. 323). She was born in France and came to America in the year of 1900, (Rec. pp. 323-4).

(The foregoing is taken from the testimony of plaintiff).

That she suffered from asthma and had traveled a good deal in attempting to find a place that would relieve her physical condition. (Testimony of Dr. Ahlquist, Rec. pp. 312-318.)

That her husband Damian Cardoner and herself owned as community property an undivided one-sixteenth interest in what was known as the Hercules mining partnership, the property consisting of the Hercules mine proper and a number of incidental properties; also some real estate in the town of Burke, Idaho.

Under the laws of the State of Idaho, an order was entered by the probate court of Shoshone county decreeing all of

said property to be community property of Damian Cardoner and the plaintiff, of which she became the owner and the same was accordingly distributed to her by decree of court, (See exhibit 46, order settling final account and decree of distribution, Rec. p. 1275). Eugene R. Day was appointed administrator of the estate of Damian Cardoner, deceased, (Rec. p. 1239), and was discharged as such administrator by decree of the probate court of Shoshone county entered on November 1, 1916, (Rec. pp. 1307-8).

That defendant Eugene R. Day was the managing partner of the Hercules Mining Company and was paid a salary out of the company's earnings contributed to by all of the members of the partnership, including the plaintiff, (Answer of Eugene R. Day, Rec. p. 176). The partnership consisted of the plaintiff and of the defendants, with the exception of Harry Allen (Answer of Eugene R. Day, Rec. 209).

Eugene R. Day was first approached by Harry Allen with reference to the sale of Mrs. Cardoner's interest in the Hercules mine on the 18th or 20th of October, 1916, (Testimony of defendant Eugene R. Day, Rec. p. 736), and the contract of purchase was entered into, and an escrow agreement made, on the 28th day of October, 1916, (Testimony of Eugene R. Day, Rec. pp. 742-3). The record does not disclose that the defendant Eugene R. Day and the plaintiff ever met or talked together from the date negotiations began for the purchase of said property on the or 20th of October until finally consummated on the evening of the 28th of October, 1916, and the record does not disclose that during said negotiations, or at any time after the said Day had become interested in the purchase of said property that he made any statements of any character to the plaintiff with reference to the value of the property or its assets, or any disclosure of any character with reference thereto. It is claimed, however, by the said Eugene R. Day that he made certain statements to her previous thereto,

which are disputed by the plaintiff and which will be particularly referred to hereafter.

The plaintiff, Mrs. Cardoner, first discovered the alleged facts upon which she has based her suit after the 18th day of December, 1916 (Tr. p. 580) ; she immediately retained Joseph W. Wilson as counsel, who employed Graves, Kizer & Graves as associate counsel on or about the 5th of January, 1917, and preparation was immediately made for filing this suit, which was filed shortly thereafter (Tr. p. 580).

When Eugene R. Day made the purchase of the property it was his intention to take his two brothers, Jerome J. Day and Harry L. Day and his sister, Eleanor Day Boyce, in as equal partners on the purchase, which arrangement was consummated as he had originally intended (Testimony Eugene R. Day, Rec. p. 872). Mrs. Cardoner, by her counsel, Willson, tendered to the defendants, Eugene R. Day and Eleanor Day Boyce, \$370,000 and interest from date of payment to date of tender on January 9, 1917. (Stipulation of Porte's Tr. p. 573.)

The deed conveying all of said property to defendant Eleanor Day Boyce in consideration of \$370,000 was executed on the night of the 28th of October, 1916, Day paying \$50,000 cash (Rec. p. 623). An escrow agreement was signed at the same time (Rec. p. 1310), and this with the deed was placed in the Old National Bank at Spokane, the deed to be delivered upon the payment of the balance of the purchase price on or before thirty days, (Rec. p. 623). The escrow agreement was taken up and the purchase price was paid by Eugene R. Day, Jerome J. Day, Harry L. Day and Eleanor Day Boyce in equal shares (Rec. p. 874), and said mining property is now held and owned by the above named four defendants in equal shares, for which they gave \$350,000 to plaintiff, (Rec. p. 874). That the real estate in the town of Burke purchased in the same transaction is held in the name of Eugene R. Day (Rec. p. 875).

The testimony of the plaintiff is substantially to the effect that no information of any character was given to her by any one, especially Eugene R. Day, with reference to the value of the Hercules mine properties, or from which she could ascertain reasonably the value thereof, (Tr. 334) nor was she familiar with the value of said mine or any of the property.

The testimony with reference to the value of the mine and with reference to what disclosures were made by Eugene R. Day, the managing partner of the Hercules Mining Company prior to the purchase of the interest of the plaintiff will be discussed and quoted from fully in the argument, and it would but add unnecessarily to the length of the brief to quote the same here.

DECREE.

Final decree dismissing plaintiff's bill was entered on the 4th day of February, 1918, (Rec. 1401).

ASSIGNMENT OF ERRORS.

Plaintiff assigned the following errors for review of said case in this court: (Rec. 1403).

I.

The court erred in admitting in evidence the testimony of the witness Eugene R. Day, to the effect that in 1906 all of the partners of the Hercules Mining Company gave an option on their property to J. P. Graves to purchase the same for a consideration of six million dollars, as shown by the following proceedings:

(EUGENE R. DAY, Witness)

"Well, there were several options given. The one in

which all the partners joined was given to Mr. J. P. Graves. I haven't the option. It was not taken up. I have searched for a copy of the option. I don't know whether the paper was returned or not. I know they turned the option down. I have not been able to find it.

Q. Will you tell the court the date of it and what amount you would receive if the option had been taken up?

Mr. Graves: I am not certain that the time is apt. I wish to object, may it please the Court, as to any option given, as wholly immaterial and irrelevant. These were offers and options not acted upon, and not admissible in evidence in determining the value of any realty.

The Court: I don't know when this option was given yet. When was it given?

A. I think in 1906. I won't be positive.

Q. I ask you now what the amount to be paid under that option if it had been taken up?

Mr. Graves: To that I object, if the Court please, for the reason stated.

The Court: The objection will be overruled. While for some purposes an option is not receivable in evidence, it is indicative of the estimate in which the owners of the property held it. It is like an offer to sell. That would indicate the attitude of the owner of the property. The objection is overruled. He may answer the question.

Witness: The option was for \$6,000,000.00. The option was not taken up."

II.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time the defendant Eugene R. Day purchased plaintiff's interests in the partnership property of the Hercules Mining Company, the said Day

was a member of the partnership and the general manager of said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs and had until a few months previously lived for ten years in Spain. That by reason of the position occupied by said Day he was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, and from which could have been determined the value or reasonably near the value thereof. That during the negotiations for the sale of said property, the defendant Day communicated no information to the plaintiff with reference thereto; that at the time of said sale she did not possess the information necessary to enable her to form a sound judgment as to its value, as was possessed by the said Day, and the information she had from the said Day and otherwise prior to said negotiations, was not all the information possessed by him and necessary to enable her to form a sound judgment as to the value of said property, and that the price paid for said property did not approximate nearly its real value, and was grossly inadequate.

III.

That the court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time the defendant Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company, the said Day was a member of said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That by reason of the position occupied by the said Day, he was familiar with all of the business of said partnership,

and was possessed of and had access to all the information obtainable for determining the value of said property, and was familiar with and knew approximately near its value, which information plaintiff did not possess. That the price paid by the said Eugene R. Day to the plaintiff did not approximate reasonably near to a fair and adequate consideration for the property purchased, but the consideration given by him to plaintiff was grossly inadequate, and known so to be by said Day at said time, and not known to plaintiff.

IV.

That the court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows; that at the time the defendant Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company the said Day was a member of the partnership and the general manager of the said partnership, and had been for many years, and that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That at said time the defendant Eugene R. Day was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, which was sufficient to determine reasonable near its value, and was familiar with and knew approximately reasonably near its value; and the evidence does not show that the price given for said property by the said Eugene R. Day approximated reasonably near the value thereof.

V.

That the court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time defendant

Eugene R. Day purchased plaintiff's interest in the partnership property of the Hercules Mining Company, said Day was a member of the partnership and the general manager of the said partnership, and had been for many years; that plaintiff was a partner who had no part in the management of the partnership affairs, and had until a few months previously lived for ten years in Spain. That the said defendant Eugene R. Day was familiar with all of the business of said partnership, and was possessed of and had access to all the information obtainable for determining the value of said property, from which could have been determined the value of reasonably near the value of said property, and the evidence does not show that all such information in possession of said Day which was necessary to enable her to form a sound judgment of the value of the said property was imparted by the said Eugene R. Day to the plaintiff before he purchased said property from her, or that at said time she possessed such information.

VI.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That the defendant Eugene R. Day, at the time he purchased of plaintiff her interest in the partnership property of the Hercules Mining Company, was the duly appointed, qualified, and acting Administrator with the will annexed, of the estate of Damian Cardoner, deceased, and that said property was a portion of said estate, and that such purchase was prohibited by Section 5543 of the Revised Statutes of the State of Idaho, and the same was void.

VII.

The court erred in that he found, ordered, and decided that the contract of purchase of plaintiff's interest in the Hercules Mining Company's property and town lots in the

town of Burke, Idaho, by defendant Eugene R. Day, before he was discharged as administrator of the estate of Damian Cardoner, deceased, was not void or voidable at the suit of plaintiff; for that said purchase was made void by the terms of Section 5543 of the Revised Statutes of the State of Idaho.

VIII.

The court erred in that he found, ordered, and decided that the plaintiff at the time she contracted to sell her interest in the Hercules Mining Company property was informed of the known conditions and facts bearing upon the value of said property; because not supported by the evidence, is in direct conflict with the evidence, and has not evidence to support it.

IX.

The court erred in that he found, ordered, and decided that the price paid by defendant Eugene R. Day to the plaintiff for her interest in the Hercules Mining Company's property approximated the reasonable market value thereof, in that it is manifestly against the great weight of the evidence.

X.

The court erred against the just rights of the plaintiff in entering a decree dismissing plaintiff's bill; in that the evidence shows: That at the time of the purchase by Eugene R. Day of plaintiff's interest in the property of the Hercules Mining Company he occupied a fiduciary relation with plaintiff, and possessed information with reference to the value of said property not possessed by her, which he did not communicate to her at the time of such purchase, from which she could have judged approximately near the value of said property; and that the defendants Jerome J. Day, Harry L. Day, and Eleanor Day Boyce were not purchasers of an interest in said property without notice, or facts, t'.

put them upon notice, of plaintiff's equitable rights.

For the purpose of simplifying the presentation of this case to this court we present this case under the following:

FINAL ISSUES.

1. Did the court err in the admission of the testimony set out in the first assignment of error?

(Under this issue we will consider assignment of error No. 1).

2. Did the defendant Eugene R. Day, prior to purchasing from plaintiff her interests in the partnership property of the Hercules Mining Company communicate to her all material facts known to him and obtained by him by reason of the position he occupied as managing partner of said mining enterprise, or did he conceal from her any such material facts so known to him; and which information was not known to her and which was necessary to enable her to form a sound judgment as might be as to the value of the Hercules mining property at the time of such sale; and were all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the time of the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?

(Under the foregoing final issue we will consider assignments of errors Nos. 2, 3, 4 and 5).

3. Did the price paid for appellant's one-sixteenth interest in the Hercules Mining Company's property, to-wit, \$350,000, approximate reasonably near its value?

(Under the foregoing final issue we will further consider assignments of errors Nos. 2, 3, 4 and 9).

4. Could the defendant Eugene R. Day purchase the property in question from the appellant, he being administrator of the estate of her husband and said property being

a portion of said estate, and was said purchase prohibited and void by the terms of Sec. 5543 of the Revised Statutes of the State of Idaho?

(Under the above we will consider assignment of errors Nos. 6 and 7).

5. Were Jerome J. Day, Harry L. Day and Eleanor Day Boyce innocent purchasers each of an undivided one-fourth interest of the one-sixteenth interest in the Hercules Mining Company's property sold be appellant to Eugene R. Day?

(Under this issue we will consider the 10th assignment of error).

BRIEF OF ARGUMENT.

FIRST POINT.

The admission of the testimony of Eugene R. Day as to certain options given by the owners of the Hercules mine upon said property for \$6,000,000 in the year of 1906 was error, in that the conditions ten years before the transaction in an actively worked mine, and especially under the facts disclosed in the evidence, would not be relevant in determining the value at the time of the sale from plaintiff to defendant, Eugene R. Day; it being too remote and conditions having entirely changed.

SECOND POINT.

If a partner who exclusively superintends the business and accounts of a partnership purchases the share of another partner, in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and second, that all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold was communicated by the former to the latter.

Authorities :

Brooks v. Martin, 2 Wall. 70-87.

Vol. 1 Rowly on Modern Law of Partnerships, Sec. 400-
Sec. 342.

Nelson v. Matsch (Utah) Ann. Cas. 1912 D. 1124 and note

THIRD POINT.

If a partner who exclusively manages and superintends the firm's business buys the interest of a copartner, the transaction is presumptively fraudulent and the purchaser will be held *prima facie* to be a trustee at the suit of the seller without proof of fraud on his part; and courts of equity will throw upon the purchaser the burden of proving the entire fairness of the transaction.

Authorities :

Perry on Trusts, Secs. 194-195-206.

Rowley on Modern Law of Partnerships, Sec. 342.

Gilbert & OCollighan v. Anderson (N. J. Eq.) 66 Atl. 926.

See Vol. 38 Cent. Dig. Partnership, Sec. 142.

Elliott on Contracts, Sec. 74.

FOURTH POINT.

If a partner who exclusively manages and superintends a firm's business and thus obtains knowledge of facts which would assist in determining the value of the firm's property, buys the interest of a copartner who has not his knowledge and means of knowledge; the failure to disclose such knowledge to the seller so that he may have the benefit thereof in determining the value of the property is a fraudulent concealment and the contract may be avoided in equity or the buyer may be held as a constructive trustee.

Authorities.

Perry on Trusts, Sec. 178.

Rowley on Modern Law of Partnerships, Sec. 400 and cases cited.

Byrne v. Jones 159 Fed. (C. C. A. 8th Circuit)

Michond v. Girod 4 How. 555 11 L. Ed. 1076.

Nelson v. Matsch (Utah) Ann. Cas. 1812 D. 1242. Note good.

Goldsmith v. Koopman 152 Fed. 173.

FIFTH POINT.

Under Sec. 5543 of the Revised Statutes of the State of Idaho, the defendant Eugene R. Day was prohibited from purchasing the property conveyed to him by plaintiff Mathilda Cardoner, he being at the time administrator of the estate of her husband and said property being a portion of said estate. By the terms of said statute said contract was void and no subsequent ratification thereof could validate such contract.

Authorities.

Revised Statutes of Idaho, Sec. 5543.

SIXTH POINT.

It appearing from the undisputed testimony of the defendant Eugene R. Day that he purchased the one-sixteenth interest of the mining property of the Hercules Mining Company from the plaintiff Mathilda Cardoner for the purpose of permitting the defendants Harry L. Day, Jerome J. Day and Eleanor Day Boyce to share in such purchase, if they so desired, and they having subsequently shared in such purchase, the whole purchase and distribution among the four defendants becomes one transaction and they are not innocent purchasers of the property conveyed to them but are bound by all the notice possessed by defendant Eugene R. Day at the time of such transfers.

Authorities:

Title "Ratification," 2 C. J. 467.

SEVENTH POINT (Fact).

The testimony establishes the fact that the plaintiff Ma-

thilda Cardoner, owning a one-sixteenth interest in the Hercules mining properties, sold the same to Eugene R. Day, the managing partner and who had been such managing partner for six years or more, while she had lived in a foreign country, and that he failed to disclose to her all the material knowledge which he had obtained by reason of his position as manager, from which she could form a just and fair judgment as to the value of said property, and especially he failed to disclose to her the earnings of said mine which at the time was within his knowledge.

EIGHTH POINT (Fact).

The testimony does not show that the consideration paid for the one-sixteenth interest in the Hercules mining property sold by plaintiff to the defendant Eugene R. Day, who at the time was the managing partner of the partnership, was approximately near the real value of said mine.

NINTH POINT (Fact).

The testimony shows that the consideration paid to plaintiff Mathilda Cardoner by defendant Eugene R. Day for her one-sixteenth interest in the Hercules mining properties was grossly inadequate.

TENTH POINT (Fact).

The testimony shows at the time of the purchase of the one-sixteenth interest in the Hercules mine by Eugene R. Day from Mathilda Cardoner that the said Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, and that said property was a part of said estate.

ARGUMENT.

I.

The first final issue adopted for convenience in arguing this case is as follows:

“Did the court err in the admission of the testimony set out in the first assignment of error.”

The testimony mentioned has already been copied in this brief and appears in the first assignment of error at page 1403 of the record, and is substantially to the effect that an option was made by the owners of the Hercules mine in the year of 1906 whereby they gave an option on said mine and mining properties for \$6,000,000.

The contention is made under the testimony this was too remote and could not possibly establish the value of the mine on October 28, 1916, and be of assistance in developing such fact. If the admission of this testimony was error, it can not be said to be harmless error because the court gave considerable weight to it in determining the value of the mine. (See decision of court, Tr. p. 1394.)

To show the fallacy of basing any correct judgment upon offers for the sale of this mine at remote times, we call the court's attention to the testimony of the witness Wood (Rec. p. 713), in which he says, “I knew of its location and they offered me a one-sixteenth interest for \$1,600.00, which I regretted very much that I did not take, so I kept in touch with its development and what it has paid.” Then again an option was given on this property in 1905 for \$4,000,000 (Tr. p. 888), and the next year an option was given for \$6,000,000 (Tr. p. 888). The latter was in 1906. The testimony shows that from the time the mine was opened in 1901 up until the year 1906 the net profits in round figures, a million and a half dollars. (See answer of Eugene R. Day to interrogatory No. 14, Rec. p. 72 et seq.); but beginning with the year of 1906 profits largely increased and exceeded three-quarters of a million average per year until the year of 1911. In 1911 the net profit was over a half million; in 1912 approximately three-quarters of a million; in 1913 approximately \$1,200,000; in 1914 approximately \$1,800,000; in 1915 approximately \$1,100,000, and in 1916 for the first

ten months it was \$2,368,682.90. (See answer of defendant Eugene R. Day to interrogatory No. 14, Rec. pp. 72 to 77, inclusive.)

It will thus be seen that for the ten months of 1916 the net profits of the mine equaled to almost one-half of the option price in 1906 after more than the option price had been taken out in net profits.

The plaintiff attempted to show by the testimony of the witness the value of this mine in 1907 and this was excluded by the court on objection by the defendants because the time was "too remote." Certainly if the same testimony at a nearer date was too remote when offered by the plaintiff, it should have been "too remote" when offered by the defendants.

II.

The next general issue adopted for convenience is as follows:

"Did the defendant Eugene R. Day, prior to purchasing from plaintiff her interests in the partnership property of the Hercules Mining Company, conceal from her any material facts known to him and obtained by him by reason of the position he occupied as managing partner of said mining enterprise, or did he conceal from her any such material facts so known to him and which information was not known to her and which was necessary to enable her to form a sound judgment as to the value of the Hercules mining property at the time of such sale; and were all such disclosures made prior to such purchase as under the circumstances the law required of said Eugene R. Day to make to the plaintiff prior to the time of the execution of the deed and contract conveying said property to the defendant Eleanor Day Boyce?"

As this is one of the main issues in this suit, we have re-

duced to a narrative form the testimony of Eugene R. Day with reference to what disclosures he made to the plaintiff Mathilda Cardoner prior to the time he purchased her one-sixteenth interest in the Hercules mining properties, which is as follows:

TESTIMONY OF EUGENE R. DAY.

The statements for the year 1916, commencing with January, and for each month including September, were all delivered by me to Mrs. Cardoner. There was a conversation in April, 1916, the very first meeting, relative to the Hercules properties. She wanted to know what about the property. I sat in my inner office and told her the details of the property as nearly as I was able to, commencing with the new mill in Wallace.

I told her that there had been many changes at the Hercules properties since she lived in Burke, that the upper levels of the mine were worked out, that exit to the ore body was gained through a long tunnel, known as the Hummingbird tunnel, by some, and by the Hercules people as No. 5; that this tunnel and property had been acquired very largely from her husband, who was a large stockholder in the Hummingbird property; that it was necessary for the Hercules Company to buy the many houses that stood on this property, so that they could have sufficient room to operate the property, and that those houses had been torn down, and machine shops, blacksmith shops, compressor rooms, and all those necessary buildings for a mine were now occupying that ground that had been purchased from the Hummingbird.

I described the condition of the mines and I told her that it was very largely worked out from the apex to the Hummingbird level, and we were sinking a shaft at that time from the No. 5 level, the Hummingbird level; that was the shaft that proceeded down and cut the vein on the 200, was

cut the ore intersected, but there was not sufficient work done there to tell about the ore bodies at that time, that the shaft was still being sunk, and I think we were nearing or about down to the 400-foot level. I told her that a station had been cut on the 200-foot level, we had drifted over to the vein and into it and intersected good ore in the vein. That shaft starts on the hanging wall side of the vein and penetrates the vein about 410 feet from its collar and goes below the 200-foot level, I don't know just what distance it had gone down at that time. I am not sure whether it had intersected the vein from the hanging wall side of the country rock before that time. It was being sunk, but I don't know just where it was at that time. I told her we had discovered good ore on the 200-foot level, but that we hadn't had time to know how good and how much we had discovered.

She wanted to know all the property interests, because she was coming into it, and she wanted to know all about it. I explained to her that the Hercules Company owned many claims, a great deal of stock in outlying claims, as a protection to the Hercules, that they had very little value, but that they were a protection to the Hercules property.

The Hercules Company itself had purchased mine stocks and smelter stocks. I described those and told her we had purchased a half interest in the Northport Smelting Company at a cost of forty thousand dollars, and three-eighths of the Pennsylvania Smelting Company at a cost of \$87,500. I went into the business of the Northport smelter or refinery thoroughly at that time and explained to Mrs. Cardoner the reason why we had gone into the Northport smelter and the refinery—that previous to going into the smelting and refining business we had had a very advantageous contract, that we were no longer able to have that contract renewed, and were without a contract for several months during the summer of 1915. During those months the mine was shut down because we had no place to ship until we got some ar-

rangements made. The advantage, I told her, of having the stock, was simply this, that I considered the business of the partnership in better condition than it ever had been before. That by having a connection with the smelter and the refinery we were able to see the ore from the time it was broken in the mine through all its processes to the market; that we received and would receive all that was in it, the by-products, and that we would get in general everything that there was in the ore. I thought, of course, that it was a good business proposition, and I told her it was. She wanted to know if I really thought it was good business; that there seemed to be so much ore in transit, and she had heard Mr. Cardoner say to keep out of the smelting business, and she wondered if it was good. I told her I certainly believed it was. I explained to her that by having these properties, and by smelting this ore ourselves, it took three months or more to get returns from the ore in the market, because the smelter or the refinery did not have the capital to do for the ore as the East Helena plant, or former shipping place, had, and that we must sell the ore to get the money. I am sure I told her that there was a very large tonnage of ore in transit, and that it would probably amount to eight hundred thousand or a million dollars. Mrs. Cardoner did not think that was a good business proposition to tie up so much money and so much ore in the smelting business. She was quite doubtful about it, but I assured her that the business of the partnership was never healthier than it was at that time. She asked me my opinion about the future life of the mine below the Hummingbird tunnel, and I told her that we had always had good ore all the way down, and the history of the country showed that the ore became baser, but I had every reason to believe that large bodies of ore would be discovered in new development by the shaft and below the No. 5 level of the Hercules property—below the No. 5 tunnel. She asked me how deep I supposed it would go, and I told her no one knew that; that the best opinion we could have would be

proved by the example of others who mined in the district close to that particular place. I recited further my idea in the matter, and told her it was my opinion at that time that the Tiger did not pay lower than the fifteen or eighteen hundred feet below the creek level.

I had conversations with Mrs. Cardoner during the summer of 1916, at my office in Wallace. She came to the office sometimes twice between office hours; she also was in my office in the evening. I gave her all the information that I had and that was available of giving, and I have given every Hercules owner every information I have regarding that property. Mrs. Cardoner's calls and visits at my office, as I have witnesses that can prove, lasted from forty-five minutes to two hours and a half. I would say I had at least a dozen conversations with her during the summer of 1916.

She was interested in knowing every detail concerning that business. She wanted to know every particular thing, and did know it, too, as near as I could tell her.

I gave her full information on every subject.

(Testimony of Eugene R. Day, Rec. pp. 720 to 730.)

CROSS EXAMINATION.

The next previous conversation to the one I had with her on the 28th day of October when the deed was signed up was in October, I don't remember exactly the time. I presume some time between the 11th and the 15th. It was with reference to the distribution of the estate. There may have been something said about the Hercules Mine. I won't be positive but the principal subject was the estate. I had so many conversations with Mrs. Cardoner concerning the mine that I can not say. I don't remember the next previous conversation to that. I think probably in August. It may have been two different dates in August, I won't be

positive about it. I know of the times but I can not give the dates. I am not able to say when it was, I can not fix the dates. I think the conversations in August were some little time apart, but she visited the office daily some times when she was in town. The last one in August to which my mind reverts was in my office. I don't recall what time of day it was. She wanted to know the condition of the business always.

Q. Please tell me what you told her at that time in that conversation.

A. I told her in that conversation as I had in all conversations, the condition of the business.

Q. Be kind enough to tell me in some detail what you told her in that conversation.

A. Well, it would be to the same import as the others were, the condition of the mine, the condition of the smelter and refinery.

Q. That is stating the subject to which it refers. I wish you would tell me what you told her on those subjects at that time.

A. I told her the condition of the partnership was never in such good shape as it was at that time, and I told her about the mine, the progress of the mine.

I told her that the mine down from the surface to the Hummingbird Tunnel was nearly worked out, but we were working hard to get new ground open so we could feed the mill sufficient. I told her about the operations; I told her that we cut a big station; that we had increased the size of the mill; that we purchased ground and purchased stocks and mining claims; I told her about the ore in transit. I did not tell her the names of the mining claims; I told her the names of the mining companies in which we had purchased stock. I told her that we bought to protect the Hercules Company's interest. I mentioned the Idaho and

Eastern, the Hummingbird; I mentioned all the conditions; I don't know exactly.

Q. I am not asking about conditions now, I am asking about the companies that you told her in August, you bought stock in.

A. Well, I had told her that in all the conversations. I can not separate one conversation from the others because we went over the same thing each time. I told her all of these stocks were purchased for the protection of the Hercules lode. Also that the Hummingbird stocks were largely purchased for the purpose of getting an exit into the ore body from a depth. I told her about the Northport Smelter, and I told her about the refinery in all of these conversations. I told her that the Northport Smelter enabled us to have an avenue for our products and we were in a position at that time to see the ore all the way from the time it was broken until it was sold. I told her that the refinery was necessary. It was not supplementing the smelter, but acting in conjunction with it in marketing ore. I told her in this August conversation there was always a large amount of ore in transit, that we did not have and the refiner did not have sufficient money to pay for the ore like the East Helena plant has, and of course we couldn't get the money until the ore was sold; therefore it necessitated a large amount of ore always being in transit. I told her of course, that we always kept a large cash reserve in order to protect the business; I told her the exact condition of the shaft as near as I could; I told her that we were sinking the shaft and doing the work as far as possible in order to open up new ore bodies; I told her that our ore was nearly exhausted before and we were hurrying to get this shaft developed; this ore that was off of the shaft, and have more ore so we could continue our operations. In the August conversation, I told her about the ore that was found in the 200 foot level; that we had encountered good ore in the 200 foot level; that

the ore was not explored enough to tell how much there was, but it looked good.

We did strike ore in the 410 feet; we went through the vein at the 410 foot; 410 feet from the collar. I didn't think we had gone through the ore at that time. I don't know whether that was the last conversation I had with her with reference to the mine or not, because I had several conversations with her at that time, and I can not separate them.

Q. I wish you would tell me about when you had the last conversation with her on the subject of the mine. I thought we had excluded all dates subsequent to this in August. If not, I wish you would tell me when you had your last conversation with her on the subject of the mine.

A. Well, it might have been in the latter days of August.

Q. It might have been later?

A. Yes, it could have been later.

Q. Well, how much later, approximately, please.

A. I won't say how much later because it might have been—we might have talked all over the mine at the time we terminated the administration business.

Q. Will you tell me as nearly as you can the date of the conversation in which you told her about striking that ore in the 410 feet from the collar of the shaft.

A. No, I can not tell you the date.

Q. Can you approximate it within a month?

A. No, I can't.

Q. You did not have that conversation with her on the 14th of October, when she was up there and received from you the money in your hands of the estate?

A. I might have told her then.

Q. Tell us if you did tell her; tell us what you told her then. Did you go into the whole subject of the condition of the mine then?

A. Each time we talked over the business we went over the same subject.

Q. Mr. Day, without stating dates now, as you say you can not do so, when you did tell her about the ore in the 410 foot level of the shaft, you distinctly remember of telling her that don't you?

A. Yes, I told her when we went through there.

Having in memory without reference to the date, I will tell the entire conversation on that occasion. I told her that we encountered ore in the shaft at about 410 feet, or thereabout from its collar. That the shaft had been sunk on the hanging wall side, and when it went through the vein it cut some ore. I told her we had gone through some ore. I told her we had proceeded with the shaft and we were working downward just as far as possible so that we could get some ore opened up. I talked over the same conditions, over and over, what occurred previously, and what was going on there. It was a repetition of the same thing all the time with the future development. I don't know that I can tell the whole conversation at that time. I went over the business with her as I had before. I told her so much about all the mine and its workings and the mill and the smelter and refinery that I can not separate it; this conversation was in my office. I can not separate the time; she had been in my office in the morning; she had been there in the afternoon and in the evening. I told her the same in substance during the summer, every time we talked which must have been a dozen times. I detailed this whole story in April or in the Spring, as I told it on the stand yesterday. I saw her many times during the summer, and each time I told her this whole story over again in general, not exactly, but in general, the same in substance. I related to her the same substance in facts. She asked me many questions. She wanted to know all about the smelter and refinery, if I thought it was good business for us to have gone into them;

this was at the first conversation. In each of the dozen conversations I had with her, she questioned whether or not it was good business to have gone into the smelting business. I told her we were forced to go into the smelting and refining business. That we were unable to have our contracts renewed. That we had to go into the smelting business, to get an avenue for our ore to the market. I told her this in all conversations. I don't know how many. She requested me to send no information to her daughter Bertha Pouchet and her son in law about the business, to send no statements to them, to give all information to herself. That was in all conversations, and she repeated it in each one. She asked the same subject matter in each conversation in substance, she asked to be told all about the business, the refinery and the smelter, the ore in transit; she mentioned all of these things in her questions. It all took place in a friendly conversation between Mrs. Cardoner and myself. I don't know as I told her the exact amount of ore in transit. I told her it might mean that we would have eight hundred or a million dollars in transit. I mean eight hundred thousand or a million dollars. She always wanted to know that in each conversation. I answered her in each of the dozen conversations that it would take 90 days to 4 months to get returns back, and of course there was the same approximate tonnage all the time according to the way we were shipping. This I told her in each conversation. She made the statement that she was coming into her husband's property and she wanted to know all about the business, and asked me to tell her generally what I could in reference to it. She might not have said the same thing in each of the dozen conversations but she always talked on the same subject. She asked for the same information in each of the dozen conversations. I reiterated over and over again the same information; I detailed yesterday and this morning. In that first conversation she asked everything that I have

repeated in these conversations, as to whether she asked more I can not say. Having in the April or in the Spring conversation, gone over in great detail as I yesterday testified, I went over it in substantially the same detail I should say a dozen times more during that summer. It might have been more, I can't state exactly. We always talked the details of the business over. In the April conversation I told her we were sinking the shaft and that the shaft had been commenced early this spring and was proceeding downward. I told her the development from time to time as they developed. I went over it with her each time. Mrs. Cardoner wanted the details and I spent some three quarters of an hour to two hours over the details there, and and each of these times, I spent the whole time going over with her these things. I wouldn't say whether we talked over the mining business at the time of the decree of distribution or not. I won't fix any date before that time as the last date on which I told her this story that I have repeated; I can't fix any approximation of the time. I won't say that it was the latter part of September. I won't say when it was. There was too many conversations for me to undertake to say. I don't know whether the last conversation was some time in August or not. In every conversation that I had with her we talked the business over. I don't know how many times she came to Wallace, when we were getting in this dozen conversations. I don't know whether the conversations were bunched in the early spring, she was there very often during the summer time. I don't know just how many times. In the various conversations she discussed the settlement of the estate with me each time. She said many times in reference to it that she wanted to get it settled up and wanted to get the money. That was the main reason for her coming here, to find out about the business and get everything terminated. I don't know that she talked about the settlement of the estate each

time but she did many times.

Mrs. Cardoner did not ask me what the net profits of the business had been up to the dates of the conversation; she had statements from me. I don't know that I did tell her, and I won't say that I did not. I told her what the net profits had aggregated.

Q. What did you tell her that they aggregated?

A. I told her that it had been a nice showing that the mine had always made. I don't know that I told her exactly what it aggregated. I went all over the conditions and she had her statements. They had down what the history of the mine had been. I refer to the statements that have been introduced in evidence. I don't think I told her the aggregate of the dividends during that time. The statements I refer to are those that have been introduced in evidence.

Q. Did you tell her about the aggregate of the dividends for that period of time, which had aggregated \$9,981,-527.72; did you tell her the aggregate of those dividends during that time.

A. No, I don't think I did.

The testimony of the plaintiff is to the effect that she obtained no information of any character from Eugene R. Day but that he persistently refused to give such information, though she had requested it of him (Tr. p. 334).

The conditions surrounding the plaintiff were substantially as follows: That she was 64 years old (Tr. p. 319), was ill of asthma (Tr. pp. 312-318), and had been residing in Spain from 1906 until she came to America after her husband's death, arriving in Spokane in April, 1916, (Tr. p. 323); that she was a native of France although she had lived in America for a number of years before going to Spain in 1906 (Tr. p. 323-4); she had lived near the Her-

cules mine from the time it was opened until she went to Spain in 1906, that is, about five years; her husband was a strong, forceful man, attended to his own business and looked after all the mining properties and interests he had in Burke up to the time he left in 1906; (Testimony of Allen, p. 654).

Mrs. Cardoner, according to her own testimony, had been very much alarmed by one Harry Allen who was encouraging her to sell the property; she stated that she was advised if she did not sell she might not get any more dividends and might lose everything; that she might have a lawsuit with the people in Spain (Tr. 340-1); that the Day brothers were bucking the Guggenheims and that they would lose all their money (Tr. p. 335.)

There is sufficient corroboration to this testimony in that of Harry Allen to show that Mrs. Cardoner was alarmed about the value of the property. He testified that she asked him if he thought the smelting business was good (Tr. p. 600), that Major Woods, her old attorney, had advised her to sell (Tr. p. 601); that the smelting business was a new venture, that when they mined their ore they did not know what they would get for it, that they were in competition with the Guggenheims, who were very strong and controlled the price of lead largely in this country (Tr. p. 613); he further stated that the Hercules company were speculating in the lead market for the reason that they were in the smelting business and depending on the market for what they would get for their products; that a remark he made could easily have been construed by her to have meant that the Hercules company were "bucking the Guggenheims and that the Guggenheims had too much money for the Days and they would be smashed" (Tr. p. 614).

From the foregoing testimony it was very evident that from some source or other Mrs. Cardoner had received information that alarmed her about the value of the Hercules

property. This fact is further fortified by the evidence to the effect that she visited Mr. Paulsen, one of the partners, in endeavoring to determine whether or not she should sell her interest (Tr. pp. 683-685) ; Mr. Paulsen did not give her any information as to the value but substantially advised her she would have sufficient money to take care of her if she held the mine or if she sold it; that his interest was not for sale.

She further testifies that she attempted to see Mr. Hutton but never could find him. Mr. Hutton testifies that she did interview him with reference to the mine and that he told her that \$4,000,000 was a good price for it (Tr. p. 672.)

Eugene R. Day testified that she came to him more than a dozen times (which she denies) to secure information with reference to the property (Tr. p. 783.)

Thus it will be seen that she was exercised over the mine and its value and was attempting the best she could to determine whether or not she should sell this property, and the condition of her mental attitude was such that she was entitled to and should have had all possible information with reference to the value of the property. That she was a widow, substantially without advisors who had knowledge of mining property, for neither Judge Wood nor Harry Allen claimed to be capable of giving such advice, and evidently was in such condition of mind that might be called "panicky," and would cause her to sacrifice her property unless she was fully advised by the only person who could really give the facts with full knowledge, (Eugene R. Day), as to the real condition of the Hercules mining property.

This suit was tried in the District Court upon the theory that it was a contract made by persons between whom a fiduciary relation existed, and that the case of Brooks v. Martin. 69 U. S. 70, was authority covering cases of this character. (See colloquy between attorneys, Tr. pp. 562-568.)

The proposition of law laid down in *Brooks v. Martin*, *Supra*, is adopted by us as our second point, which is as follows :

“If a partner who exclusively superintends the business and accounts of a partnership purchases the share of another partner; in order to sustain such a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold was communicated by the former to the latter.”

We believe from all the testimony in this case with reference to value that the following are among the most essential facts necessary to determine the value of the mine, stated in their order of importance :

1. The net income year by year, and particularly the present net income.
2. The dividends declared year by year and aggregate.
3. The previous history of the mine and its production.
4. The conditions as they appeared within the mine on the date value is sought to be proven;
5. The history, production and depth of mines of like character in the same locality or district.

Taking all these elements of value, we wish to refer to certain propositions of law. In the case of *Brooks v. Martin*, 2 Wall. 70, the Supreme Court of the United States had before it a very similar case. A bill was filed in Chancery to set aside a contract by which appellant had sold his interest in a partnership mine. The purchasing partner was the manager of the mine and the other lived at a distance from it. It is unnecessary to go into details of this case. The purchase of the mine was admitted but the fraud was denied, as it was in this case, the appellee claim-

ing that the transaction was in all respects fair and honest. The court said:

“If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller and is therefore under no special obligation to deal conscientiously with each other we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there are relations of trust and confidence which one man may occupy towards another, either personally or in regard to particular property which is the subject of contract which imposes upon him a special and peculiar obligation to deal with the other person towards whom he stands so related with a candor and fairness and a refusal to avail himself of any advantage of superior information or other favorable circumstances not required by courts of justice in the usual business transactions of life * * * *”

Without going further into this case, it was determined that the managing partner bore the same fiduciary relationship towards his copartner as that of cestui que trust, and stated:

“We lay down then as applicable to the case before us and to all others of like character, that in order to sustain a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased, and, second, that all the information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter.”

The question under this issue is whether or not Eugene R. Day communicated all the information he had obtained

by reason of his position as general manager of the Hercules Mining Company to Mrs. Cardoner before entering into the contract for the purchase of said property.

The first and most important element in determining value of any property is the net income of such property. All information claimed to have been disclosed by Day to Mrs. Cardoner has been heretofore fully set out in this brief; but as this in our view is the most important element in connection with value, we make reference to this testimony which may be found at page 792 of the record and is as follows:

"Q. Mr. Day, did you tell Mrs. Cardoner what the net profits of the business had been up to the date of the conversation?"

"A. She had statements from me and she didn't ask me that."

"Q. Pardon me, did you tell her?"

"A. I don't know that I did and I won't say that I did not."

"Q. The net profits as shown by your answer to one of the interrogatories was \$11,915,986.74 up to the 28th of October, 1916, did you say anything to her about what they aggregated?"

"A. Yes, I said to her what they aggregated."

"Q. What did you tell her they aggregated?"

"A. I told her that it had been a nice showing that the mine had always made."

"Q. What did you tell her they had aggregated, if you told her?"

"A. I don't know as I told her exactly what it aggregated; I went all over the conditions and she had her statements and they had down what the history of the mine had been."

"Q. The statements that you refer to are those that have been introduced in evidence?"

"A. Yes.

Q. Did you tell her about the aggregate of the dividends according to that same answer, the dividends for that period of time which had aggregated \$9,981,527.72, did you tell her the aggregate of these dividends during that time?

"A. No, I don't think I did."

Then the question is whether or not Mrs. Cardoner had sufficient information from the statements referred to that would advise her as to what the net income of the mine had been. These statements were introduced in evidence and appear as plaintiff's exhibits 2 to 7, and defendant's exhibits 19, 20, 21 and 22; the latter exhibits plaintiff testified she never received. Also the defendant's exhibits Nos. 55, 56, 57, 58, 59 and 60, the last exhibit, No. 60, being a statement for September, 1916, and appearing at pages 1359 to 1367 of the record and would contain as much information as could be obtained practically from all the statements excepting of course the dividends declared each month could be determined by calculation. An analysis of these exhibits shows that the information as to the net income of the mine is not given. About the only substantial testimony with reference to values contained therein is the amount of dividends which were paid up to that time. There is nothing in all these statements to indicate what the net income of the mine had been at any time, and there is no testimony in the record to show that the plaintiff was familiar with the condition of the mines other than the testimony of Eugene R. Day and the fact that she was possessed of these statements. The statements furnished her were only those subsequent to her husband's death, which covered a part of the year 1915 and all of the year of 1916 up to and including the month of September. The September statement shows that the dividends had been \$10,379,527.72 but there is nothing in the statement from which it could be determined what the net income had been. For instance, the

statement for January, 1916, (Tr. p. 1153 to 1160) shows the dividends had been \$8,979,527.72. By calculation it might be determined from this how much the dividends had been including September, 1916, for the previous nine months \$1,400,000. But the testimony of Eugene R. Day, as reflected by his answer to interrogatory No. 14 (Tr. p. 77) shows that up to and including the 28th day of October, 1916, the net profit for the ten months of said year was \$2,368,682.90, or approximately a difference of a million dollars between the net income and the dividends during said period. The plaintiff had a right to believe, unless otherwise informed, that the dividends would approximate the earnings of the mine inasmuch as the dividends apparently were paid monthly. During the year of 1915 the net profit of the company was \$1,096,019.37 and the dividends were \$320,000, making a difference between the net income and the dividends paid of \$776,019.37, (Tr. p. 77). These are the only two years that her husband had not managed the mining interests as he died in July, 1915. From these reports it will thus be seen there was absolutely no way of determining the net income of the mine. Of course the fact that she had knowledge of the dividends paid would be of little importance where the dividends were not substantially those of the earnings. She then must have believed that the earnings of the mine in 1915 was not more than \$320,000, and in 1916 up to the date of sale was \$1,400,000, because no other information, according to the testimony, had ever been given to her. We believe that any person desiring to value the Hercules mining properties would have been more interested in knowing the net profits immediately preceding the date of purchase than of any other time. The actual production of the mine at the time of the purchase was a great deal more important than previous dividends paid or even the amount of production of previous years. If Mrs. Cardoner had known that instead of \$1,-

400,000, as the statement shows dividends were declared that the mine had actually produced in net profits in ten months \$2,368,682.90, or for the whole year at the same rate (Eugene R. Day testified that the production for November and December was approximately the same as that of October, (Tr. p. 852), of more than \$2,750,000, she would have been an embicile to have made the trade,, especially had she been informed that the probability was the mine would continue to pay for a period of ten years as testified to by Eugene R. Day. (Tr. 762). But the testimony shows that the ore taken out for the months of November and December, 1915, equaled 16,317.50 tons, while for the previous months it equaled to 70,871.61 tons, or 23 per cent of the whole year was taken out in November and December after the sale. This is calculated from plaintiff's exhibit No. 53 appearing at page 1319 of the transcript. The net inome for the year of 1916 would in fact be \$3,206,000/based on the amount of production and assuming that the ore extracted in November and December was of equal value to that of the other months. In other words, if she had been informed that the net production from this mine for the year of 1916 would be within \$8,000,000 of the estimated value for which she sold it, she certainly would not have made the trade.

It is well here to state in this brief that the mine and all property connected with it including more than one million dollars in ore already extracted and sold but not paid for, was valued at five million dollars, (See answer of Eugene R. Day to interrogatory No. 17, Tr. p. 78, in which he states that on the 28th day of October, 1916, there had been sold and shipped crude ore and concentrates not paid for and due said company to the amount of \$1,048,864.14.) If this is subtracted from the five million dollars basis upon which the mine was sold it will leave a balance of \$3,951,135.86 as basis of value for the Hercules mine, the Northport smelter,

Pennsylvania refinery, the Wallace mills, and all of the properties of that partnership with the exception of the cash in bank, estimated to be \$600,000 and of which she was given her one-sixteenth. In other words, the actual net profits of the mine for the one year of 1916 almost equaled the value placed upon the mine when it was purchased. Had this information been given to Mrs. Cardoner by Eugene R. Day no reasonable person believes she would have sold her interest at any such figure

From some reason unexplained, or not sufficiently explained, there was only \$320,000 in dividends declared in the year of 1915 when the net earnings were \$1,096,019.37 (Tr. p. 77.) Mrs. Cardoner apparently knew of the small dividend but was never advised, according to her testimony, the reason dividends were small during that year (Tr. p. 340.)

2. Another element to determine the value of the mine is the dividends that had been declared. It will be seen from the answer to interrogatory 14 that appears at pages 72 to 77 of the record that the dividends declared approximated the net earnings each year up until the year of 1915, the very year that Madame Cardoner became possessed of the property, and in 1915 the dividends were less than one-third of the net profits, and in 1916 they were a million dollars less than the net profits up to the date of sale. There is no testimony that Mrs. Cardoner had any evidence as to the earlier condition of the mine with the exception of the statements introduced in evidence and heretofore referred to.

3. It will be impossible to quote at large in this argument from the testimony of the witness Eugene R. Day with reference to what information he actually did furnish the plaintiff, but the testimony has already been quoted at large in this brief. We do not hesitate to say that if any person can read over that testimony and determine there-

from any particular judgment as to the value of the Hercules mine he must be a person of more than ordinary intelligence. There is no testimony at all to show any knowledge by Mrs. Cardoner of the previous history of the Hercules mine except the fact that she was furnished the statements heretofore mentioned which showed dividends had been paid approximating \$10,380,000 and that she had lived near the mines until 1906. Whether she understood these statements is a disputed question. Certainly there is no direct evidence to prove it and she denies that she did understand them (Tr. p. 420.) There is no testimony given as to the amount of ore taken out, the width and length of the ore bodies above the Hummingbird tunnel, nor in fact anything from which an engineer could determine the quantity of ore that had been removed from the mine. Nor is there any evidence to show that she was advised as to the mineral content of the ore in lead and silver, nor the prices received therefor during its previous history. The statements of Eugene R. Day were general in every particular. He attempted to cover the whole ground by stating numerous times "I told her everything," etc., without stating what "everything" was. He said he told her about the mill at Wallace. That is practically all the information before the court as to what was actually said to Mrs. Cardoner about the new mill at Wallace, (Tr. p. 720). He told her that the levels about the Hummingbird tunnel had been practically worked out (Tr. p. 71), which was material information, but he did not tell her the amount of the ore that had been taken out in the aggregate or by years, nor what it was sold for nor the changes in quality. He told her that they were in process of sinking a shaft from the Hummingbird tunnel (Tr. p. 722) and that they were near the 400-foot level. That a station had been cut at the 200-foot and that they were drifting over to the vein and into the vein and had intersected good ore in the vein (Tr. 728); this in-

formation was of value but was scarcely practical without some knowledge as to the size of the vein, whether or not the ore was the same quality or better or poorer than that previously mined, and the general showing made at the 200 and 400-foot level. A mere statement that the vein had been struck at the 200-foot level was not sufficient information to base any judgment as to the value of the vein. He explained to her that the Hercules Mining Company owned many mining claims and a great deal of stock as a protection to the Hercules, but they were of very little value. That they had purchased a half interest in the Northport Smelting Company and a three-eighths interest in the Pennsylvania Refining Company (Tr. p. 724.) He stated that by having a connection with the smelter and refinery that they were able to see the ore from the time it was broken in the mine through all its process to the market and that they would receive all that was in it (Tr. p. 725), but she was not advised as to the earnings of the Northport smelter and the Pennsylvania refinery, nor how much benefit the stock in these companies would be to the Hercules mine. She was simply told that it was good business. He states that he thought he told her that there was a large tonnage of ore in transit which would probably amount to \$800,000 or \$1,000,000. He stated that he told her that he believed that large bodies of ore would be discovered in new developments (Tr. p. 727), but he gave no idea about what he meant by large bodies of ore, whether they would be as large as those discovered in the levels above nor what was the size of the ore bodies previously discovered. He says that he told her that the depth of the mine from the best opinion would be proved by the example of other mines in that district close to that particular place. This information was of value but was largely without benefit unless she was told the depth of other mines and the size of the ore bodies that would extend to that depth. On cross examination Mr.

Day's testimony would indicate that Mrs. Cardoner was somewhat of an embecile and that he was a very patient man. This cross examination was extremely interesting. He states many times that he told her "at least a dozen times" over and over again the same facts on each visit she made to his office during the spring and summer of 1916. Every conversation was exactly alike (Tr. p. 774). This whole testimony can be sifted down and practically no real information as to the value of the Hercules mine according to Eugene Day was communicated to Mrs. Cardoner. His statements "I told her about the Northport smelter and the refinery in all these conversations," that the refinery was necessary, was of little worth in determining the real value of the Hercules mine. The fact that he told her they were sinking shafts and had struck the ore at 410 feet below the Hummingbird tunnel (Tr. p. 776) would indicate very little unless there is some further testimony to show the size of these developments. The burden of his testimony was "Well, I talked over the same conditions over and over, what occurred previously, because that was the operation of the mine, just simply told the conditions and what was going on there, and it was a repetition of the same thing all the time with the future deelopment" (Tr. p. 779).

The cross examination showed that the information given Mrs. Cardoner, according to Day's own testimony, was very meager indeed, and his refusal to answer questions, equivocation, and statements that the same particular facts were talked over in each conversation, something extremely unreasonable, does not place it above serious doubt and suspicion.

Eugene R. Day testified that he had not thought of purchasing this property until the 20th of October, just a few days before the trade was closed on the 28th of the same month (Tr. p. 793); he testified that the last conversation he had with Mrs. Cardoner was probably in August (Tr. p.

771.) Later on he stated that he did not know whether it was in August or not (Tr. p. 786). At no time does Eugene R. Day intimate that he advised Mrs. Cardoner with reference to the condition of the mining properties after the 20th of October, on which date he first thought to making the purchase, with a view of enlightening her as to conditions of the property so that she might form a just and reasonable judgment as to its value. *All of the information he claims to have given her was in answer to questions asked him about the property, because as he stated, she had come into the property now and wanted to know the facts about it, and was not made with a view of apprising her of conditions so that her judgment would be safe in making a sale.*

It is quite certain from the evidence that he did not desire her to have the necessary information, for he bargained with her or Allen as though she were a stranger selling her interests. Allen testified that the negotiations were carried on for several days. She was first offered \$275,000 for her interest, which included cash on hand for which subsequently she was paid \$37,500 (Eugene R. Day's testimony, pp. 736-7). This would be \$237,500 for her interest in the mine and the more than a million dollars of ore in transit, or a basis value of \$3,800,000 for the mine and ore, and less than \$2,800,000 for the mining properties, smelters, accounts, refineries, mills and all other property belonging to the partnership, a sum of money less than the mine actually earned during the year of 1916, (Tr. pp. 602-605.). Day testified in this regard that in making the trade "I wanted to buy it at as reasonable a price as I could." (Tr. p. 807), that he would have taken it at \$275,000.

"Q. That is to say, you were making as good trade with her as you would try to make with me?

"A. I would try to make the best trade I could make.

4. The only practical information given Mrs. Cardoner with reference to the conditions within the mine was that substantially to the effect that the ore bodies had been worked out above the Hummingbird tunnel and that good ore had been struck in the shaft at the 200 and the 410-foot level below the Hummingbird tunnel. There is practically no other information given with reference to the inside of the mine that would be a basis for fixing value. We have already discussed this part of the testimony.

5. The only mine in the district mentioned by Mr. Day, according to his testimony, to Mrs. Cardoner was that of the Tiger, which he says he told her had gone down 1500 to 1800 feet below the creek level (Tr. p. 728.) The testimony shows there were a large number of other mines in that vicinity, some going deeper than the Tiger, as shown by the witness Burbridge at page 919 et seq, to the effect that the Standard Mammoth shaft was sunk 2050 feet, the Hecla was 2200 feet, the Tiger 2200 feet (Day told Mrs. Cardoner this mine was only sunk 1500 or 1600 feet.) So that a history of the mining operations in and around the Hercules mine was not imparted to Mrs. Cardoner, though Day's testimony shows that he had been engaged in mining at Burke since 1901.

Where one partner is sole manager of the business he is a trustee for all the others and bound as a trustee in his dealings with the other partners:

McAline v. Miller, 104 Minn. 299 116 NW. 586.

He is a trustee and as such trustee he is bound to the utmost good faith towards his partners, and especially when attempting to purchase an interest.

"There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does

not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee. Thus, if an attorney contracts with his client without disclosing to him material facts in his possession, the contract would be void. The trust and confidence of the client in his attorney is such that an obligation is imposed upon the attorney to communicate every material circumstance of law or fact. Mere silence, under such circumstances, becomes fraudulent concealment. The same rule applies to all contracts of an agent with his principal, principal with his surety, landlord with his tenant, parent with his child, guardian with his ward, ancestor with the heir, husband with his wife, trustee with his *cestui que trust*, executors or administrators with creditors, legatees, or distributees of the estate, *partners with their copartners*, appointors with their appointees, and *part-owners with part-owners*; though the part-owners of a ship, holding by several and independent titles, were held not to stand in such confidential relations to each other that one was under obligation to communicate material facts upon a negotiation to purchase. If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost good faith. It is not enough that they do not affirmatively misrepresent: *they must not conceal; they must speak, and speak fully to every material fact known to them*, or the contract will not be allowed to stand. Thus if a partner who keeps the accounts of the firm should purchase his copartner's interest, without disclosing the state of the accounts, the agreement could not stand. The same rule applies to family relations in general; as, where a younger brother disputed the legitimacy of his elder brother, and a settlement and partition were entered into, the younger brother having in his possession facts that tended to show that his parents intermarried before the birth of the elder, which facts he did not communicate, the

settlement was set aside. The duty of disclosing facts arises either from a fiduciary relation, or from a trust properly understood to be reposed in one party by another about a matter concerning which the latter has peculiar means of information."

Perry on Trusts, Sec. 178.

"There are also, cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. Thus if a party taking a guaranty from a surety does not disclose facts within his knowledge that enhance the risk, and suffers the surety to bind himself in ignorance of the increased risk, or if a party already defrauded by his clerk should receive security from a third person for such clerk's fidelity, without communicating the fact of the fraud already committed, thus holding the clerk out as trustworthy; in both these and in similar cases the contracts would be void for concealment. Silence as to such facts, under such circumstances, would be equivalent to a positive affirmation that no such facts existed. And so, if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the relation was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances *is bound to destroy the confidence reposed in him, or to state all the facts which such confidence demands.* He cannot himself contract at arm's length, and permit the other to act as though the relation was one of trust and confidence. And so, if one party knows that the other has fallen into a delusion or mistake as to an article of property, and he does not remove such delusion or mistake, but is silent, and enters into a contract, knowing that the other is contracting under the influence of

such delusion or mistake, the contract may be set aside; *for, not to remove that delusion or mistake is equivalent to an express misrepresentation.*"

Perry on Trusts, Sec. 109.

"A trustee may buy from the *cestui que trust* provided there is a distinct and clear contract after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy and there is a fair consideration, no fraud, no concealment, no advantage taken by the trustee.

The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney he must show that he gave his client who sold to him full information and disinterested advice. Lord Eldon admitted that this exception was a difficult case to make it. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of all his rights on the part of the *cestui* or any inadequacy of price will make such a purchaser a constructive trustee.

Perry on Trusts, pp. 318-320, Sec. 195.

Under the above rule, we believe the court must find that the second requirement as laid down in *Brooks v. Martin*, 2 Wall. 70, to sustain such a contract, to-wit, "That all information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold must be communicated by the former to the latter" has not been complied with.

III.

The third finally issue into which we have divided this brief for convenience, is as follows:

"Did the price paid for the appellant's one-sixteenth interest in the Hercules Mining Company property, to-wit, \$350,000, approximate reasonably near its value?"

Referring again to the case of *Brooks v. Martin Supra*: The first condition upon which such contracts are permitted to stand as laid down by rule in that case is "That the price paid approximates reasonably near a fair and adequate consideration for the thing purchased."

It must be borne in mind that the burden of proof in a case of this character is upon the purchaser of the property.

Perry on Trusts, Sec. 194-195-206.

"Where a confidential relation exists between the parties to an agreement it is the duty of the dominant party to make a full and clear statement of all facts which relate to the subject-matter of the contract. Not only this, but such party will be required to fully establish the agreement and remove from it every element of doubt or suspicion that may attach to its execution. The law thus rightfully places the burden upon him of proving the righteousness of his conduct the validity of the contract. The one standing in a confidential relation who conceals or fails to make a full disclosure of facts which are within his knowledge, knowing the other party to be ignorant of those facts, is guilty of fraud both in law and in equity.

Confidential relations have been held to exist between trustee and cestui que trust, principal and agent, attorney and client, physician and patient, husband and wife, parent and child, guardian and ward, partners, clergyman and parishioners, and some others."

Elliott on Contracts, Sec. 74.

The testimony should show under this issue that Eugene R. Day paid approximately near the value of the one-sixteenth interest in the Hercules mine on October 28, 1916, and under the law it is his duty and he is required to fully establish such fact and remove from it every element of doubt or suspicion that may attach to it. (Elliott on contracts, Sec. 74.)

It will be impossible to present in this brief a full state-

ment of all the evidence on the question of value because of its length, but we will state in substance, at least, the evidence as given by the witnesses. First, however, we will state that the property of the Hercules Company (not a part of the mine proper) and its original cost approximating a million dollars is set out in the answers of Eugene R. Day to interrogatories 19, 20 and 21, appearing on pages 75 to 91 of the record, and is substantially as follows:

Land (Exhibit 60, Tr. p. 1365)	\$ 14,500.00
Timber Land	4,250.65
Hidden Treasure Mine	392.00
Idaho Eastern Mining and Milling Co.	25,206.39
Hummingbird Mining Co.	207,272.43
Abergris Mining Co.	34,019.51
Basin Mining Co.	22,662.65
Press Times Publishing Co.	1,000.00
Northport Smelting & Refining Co.	288,289.70
Pennsylvania Smelting Co.	87,500.00
Wallace mill	150,891.09
Dwellings	11,403.63
Power line	26,180.39
Sundry Investments	29,400.67
Republic mines	46,500.00
	<hr/>
Making a total of	\$949,469.11

This does not take into account any of the improvements around the mine nor a large number of assets apparently listed in the statements as shown by exhibit 60 at page 1365-6-7, such as \$25,000 loaned Pennsylvania smelter, a saw mill, compressor, Burke power, Tiger Hotel Company of \$13,062.32 and other property. There is absolutely no testimony as to the real value of any of the above property except that Eugene R. Day testified substantially that it was only valuable in connection with the Hercules Mining Company interests, although the Northport smelter and

Pennsylvania refinery were engaged in the smelting and refining business by making charges like any corporation of its character. Mr. Day further testified that better rates were obtained by the mining company on account of their interests in the smelter and refinery but no indication was given as to what these better rates were, or their value to the Hercules company.

TESTIMONY OF EUGENE R. DAY

We cut across at the 200-foot level, we struck the vein at 40 or so feet. The vein was dipping towards the shaft about as usual. About 400 feet from the collar we went through the ore; it was not a new shoot. We went through it to the foot wall side; the shaft we was driving was 10x30 feet. I didn't know the width of the ore body; we hadn't opened it up sufficiently to tell but it was about 10 to 12 or 14 feet; the vein doesn't run uniform. We didn't measure it, I could see it was substantially the same but there was always decrease in silver and a raise in iron values as the ore bodies go down. It always amounts to a great deal. I didn't sample it. I didn't figure the amount of ore between the No. 5 level and where we cut the vein at 400 feet in the shaft. I figured in the life of the mine the property had produced ten million dollars in dividends, or thereabouts. I didn't figure how much ore there was from the 400 level in the shaft the balance of the 1100 feet. My general notion was as depth was obtained the iron contents and zinc contents would cut out the silver and lead, that the vein would become barren largely as depth was attained. I couldn't say whether the area of ground 200 feet below No. 5 would produce about the same as the area of ground for 200 feet above No. 5; I didn't know how far the ore bodies would go down. I figured that the ore bodies would be the same. There were three ore chutes at the No. 5 level. I figured as a mining proposition that I could see enough in sight to

get my money out and protect the interests which we already had in the property. I figured that three-fifths of the mine above the Hummingbird tunnel was about exhausted, that two-fifths remained and in the same proportion if everything was as usual that would produce two-fifths of ten million dollars if it would go down 1500 feet on three chutes.

Discovery was up on the hill above the No. 1 tunnel 2250 feet above No. 5 level. We had stoped at 2250 feet. In the beginning the ore bodies were short and narrow, I don't know their width but they were reasonably wide. I won't give the width because I don't remember exactly. The length was perhaps 250 feet or thereabouts; I don't know the total length of ore in the upper workings or any level. We may have had more than one chute. I knew at the time. The ore bodies were somewhat longer in places as we came down and some places were not. I don't know the length of the ore bodies or at No. 5 at the west end of the west chute to east end of the east chute. There are three chutes there, two extremely small, and I can not give the length of any of them. They were longer but very much narrower than No. 1. I was frequently near when they were mining and stoping. It was electrically lighted. I saw the work going on but can not tell how wide the ore was, or approximately. It varied. It is in and out. I am not going to give any approximation. Unless I know what it is I am not going to approximate. I am not going to give something that I can not say is correct. I don't know exactly how long the west ore chute on No. 5 was. It was approximately 600 feet long. I don't know and I can not approximate the length of the central ore chute on No. 5. I knew general conditions on the 28th of October, 1916. I can not give the length of the central ore chute on that time. The east ore chute on the No. 5 was possibly 160 feet long. The west ore chute, that is the larger ore chute, the one that the history

of the mine was made on, goes clear up; that is the one we started on. I call it the big ore chute. The east ore chute went up some distance, I can not say exactly. On the 28th of October we were stoping within the limits of these three intermediate levels above the No. 5 450 feet. For more than a year we had been stoping between the 800 foot level and the No. 5. All the ore mined during the ten months of 1916 came from between the No. 5 and these three levels. We had been stoping there for several years between the No. 5 and 8. The bulk of the ore for several years had come from there. Very little of it had come from above No. 8. I would say for several years, I won't say for what years. I approximate it as four or six years. We were not ready to stope on the 400 foot level on the 28th of October. At the 200 foot level in the shaft we had proceeded on the vein just as fast as we could, but it is impossible for a man to say how far. We had gone through several hundred feet of good ore.

Q. Just as good ore as you had on 5?

A. I am not going to say it was, Mr. Graves, it was good ore.

We hadn't drifted at the 400 foot level. We were just cutting the station. The ore there had a good width. I don't know how wide it was. I can not give you the width of the ore. It was the usual width, however, going down there, just kept the same there as near as I could say. The mine was shut down about three months in 1915 because our contract with the Helena smelter had expired. On this account and on account of the purchase of the Pennsylvania and the Northport plant the net profits fell off below what they were in 1914 and 1916. On the 20th of October, 1916, I believed that the ore body I would strike at the 200 level in the shaft would be substantially as I found it when I did strike it and when I drifted on it. I believe that we would always get good ore in the shaft. At the 400 level I found

it about the same except that I knew all the time it was losing its silver content, that the iron was coming up. I expected to find that the ore would go on down about as I have indicated all the time. It was a speculative proposition, none of us knew, of course. None of us took professional advice about the condition of our business. I took a miner's and a prospector's chance. The statement of the bookkeeper that the month of November production was 200 tons less than October and the month of December was 300 tons more than the month of October showing monthly shipments is I think correct. On October 28 all the ore above the No. 5 level had been blocked out and in sigs. There hasn't been any considerable tonnage going out of there for some time; nearly all the tonnage is coming from below. Our tonnage increased from October 28, 1916, to October 28, 1917. There is a sign of their falling off now. There are indications.

Q. Have you gone since the 28th of October, 1916, far enough on your drifts on the 400 foot level to say whether bodies are as they were above the No. 5?

A. We have.

Q. Have you demonstrated that your judgment was right about that?

A. I am pretty sure it is.

(His judgment, as he testified to as hereinbefore set out, was that the ore bodies would continue down about as usual except a falling off of silver content and an increase in iron.)

In 1906 I think we were working on No. 3 tunnel, about 450 feet below No. 1. In 1905 we were working all the way down from No. 1, 2 to 3. Some of them had been exhausted in 1905. The Northport smelter was built as a custom smelter and the owners went broke, and the Pennsylvania refinery was built as a customs refinery. The in-

terest of the Hercules in the refinery is three-eighths. We hav spent considerable money in repairing it. The Northport smelter bought a mine after we bought it; I think \$40,000 was paid for it. It was acquired not long after we got the smelter. The smelter makes a regular customs charge. It is better than the customary charge that we would have been able to contract with other people for. We deal exclusively with the smelter and they transact their business with the refinery. I understand we get better arrangement with the refinery than we would have been able to have gotten with a customs refinery. The Northport smelter accounts to us for the ore. We return more money to the Hercules than we would by selling elsewhere. In breaking down the ore there is considerable waste rock. Usually if we ship 10 to 14 cars of ore we would ship a couple of waste. All the waste does not go out; we use it wherever we can for filling purposes.

(Mr. Folsom, a witness, here states that an option for \$6,000,000.00 in 1906 covering the Hercules Co. property, was given on the 3rd or 4th of August good for 60 days.)

(Testimony of Eugene R. Day, Tr. 811-867.)

REDIRECT EXAMINATION

The big ore chute was about 600 feet long, I call the other two the east ore chutes. One was a little one, the far chute, was about 125 to 150 feet, the far east, and the middle ore chute about 250 feet long I think, I am not sure now. We didn't encounter the east ore chute on the 200 foot level; it seems to have quit before it came down. The west ore chute shortened up about 125 feet. It shows a continuous shortening up, I think it is about 125 feet shorter on the 600 level than it was on No. 5 tunnel. The eastern ore chute is gone. The indications are the middle ore chute is going to rake into the big one, come together, intersect. The

ore chutes do not seem to be narrowing, they are shortening though. The ore is continuously baser as we go down, the silver values are lower considerably all the time and the lead is a shade lower; we are not troubled so much with zinc, it is mostly iron that bothers us. We are sinking a perpendicular shaft in the country rock. I don't think the property would have such a bright looking future as if the indications of shortening the veins and baser ore weren't there. It don't look so bright as it did on the 28th of October. I can't say the degree it would look darker. With the knowledge I have now I would debate very seriously over buying it.

Q. I imagine you would be glad to get your money out of it, wouldn't you, that you put into it with interest?

A. There were different reasons why I put my money into it; I am perfectly willing to stand by any trade I ever made. (Tr. pp. 867-870.)

TESTIMONY OF MYRON A. FOLSOM.

This witness testified that Frank M. Rothrock and others executed an option in 1905 for six months for his one-thirty second interest in the Hercules mine on the basis of \$4,000,000, supposed to cover all the physical properties of the company, and at the same time the Day family and Damian Cardoner gave an option on the same basis.

In 1906, about the first of August, all the owners of the Hercules mine gave an option to J. P. Graves agreeing to convey the Hercules property for \$6,000,000 in cash, \$20,000 being paid down and forfeited. (Tr. pp. 885 to 887.)

TESTIMONY OF FREDERICK BURBIDGE.

I have been a mining engineer, managing mines mostly, for twenty or twenty-five years. I know the Hercules mine. I have made an estimate of its value as of the 28th day of

October, 1916. I included all the property of the company, that is, I mean cash on hand and ore in transit. My knowledge was obtained from data placed in the answers to the interrogatories that were propounded by the plaintiff in this case and the maps which show the location of the claims. I also made a physical examination of the property. The answer to the interrogatories gave the character of the past production of the mine, the tonnage, the grade, the amount of money received for it, the cost of extraction, the profit derived from the operation of the mine during the period of years from the beginning of operations to October 28, 1916. The question of determining the value of the mine depends upon how much ore there may be in the mine at that date and the assumption as to its like tenor and like value.

I have investigated for the purpose of forming a judgment. There is ore at the bottom of the mine and I know it goes deeper but how much deeper is not absolutely known, but we may form a certain conclusion as to its approximate depth from the depth of other mines in the vicinity. I made a physical examination ten days ago. I was there just one day. I examined three levels on which they were working, entering the stopes below the No. 5 tunnel.

Q. Did you make a careful, exhaustive examination and survey or anything of that sort?

A. No.

Q. Did you sample it?

A. No.

Q. Well, what did you do to examine it?

A. Just to see if there was ore there.

Q. Just walked through?

A. Yes, the history or record of production of the mine, or the grade of ore that has been produced is much more informing than the samples that may be taken from the

face of the ore exposed. I didn't go above the No. 5.

The court: I think I shall let him answer. It may or may not be of much weight; we will see when we get through.

Q. You may answer, Mr. Burbidge, what was your estimate of the value on the 28th of October, and then you may state to the court your reasons.

A. I arrived at an estimated value of the property as of October 28, 1916, of \$6,175,585.00.

In estimating the value I made a separate calculation of the value of the ore, then added the cash and the ore that is in transit; I did not include the Northport smelter or the refinery at Pittsburgh or anything of that sort. This estimate relates simply to the mine. It includes everything that they owned, but what Mr. Graves asked me about the smelter and refinery, I considered them, they are an adjunct of the mine, part of the mine. When the mine is through these plants will be useless. They will have nothing but a junk value.

The value of the Hercules mine depends, of course, upon the depth to which it may profitably worked. In estimating the depth we were controlled by the data available concerning other mines in the vicinity. The Tiger ceased to be profitable at what corresponds to 1900 feet below Hercules No. 5 tunnel; the Standard at 1650; the Frisco at 1500. The conclusion is therefore forced that the Hercules is not likely to be profitable at a greater depth than 1900 feet below No. 5 tunnel.

There has been a fairly constant decrease in the silver content of the ore from 1.25 oz. to each unit of lead in the upper working to .8 oz. to the unit at present. This is likely to continue, it being characteristic of the mines of the district.

As greater depth is obtained and the workings approach

the lower horizon of the Burke quartzite the ores become more zincy, the zinc to a considerable extent displacing lead. While the zinc has some value it is much less than the value of the lead it displaces.

These factors must all be taken into account when estimating the value of the mine.

From the beginning of operations at the mine down to October 28th, 1916, the total amount of ore mined was 1,777,591 tons. At that date there was ore remaining above No. 5 tunnel of an average depth of approximately 50 feet. The depth of the mine down to No. 5 tunnel is 2250 feet. There had therefore been worked out 2200 feet, and there remained 1950 feet to be mined down to 1900 feet below No. 5 tunnel, the estimated limit of profitable operations.

Assuming an equal productiveness for the remaining workable ground we get

$$1777591 \times 1950 = 1575600 \text{ tons}$$

2200

as the probable tonnage remaining in the mine as of October 28th, 1916.

From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore; an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine, as of October 28, 1916, would last say 9.4 years.

The profit realized during the period 1907-1916 averaged \$5.88 per ton, and the operating cost averaged \$4.59.

In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged \$3.37.

Mr. Graves: What was that last period you gave?

A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal.

It was difficult to estimate the probable profit to be

realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was \$2.71 per ton of ore mined, and in 1916 it had grown to \$5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25c per ton to the cost.

This country had not then entered the war. But it was even then a matter of general belief that after the war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver.

Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from \$2.50 to \$3.00 per ton.

Taking the estimated tonnage at the latter value we have 1,575,600 tons at \$3.00, \$4,726,800; adding cash on hand, \$649,359. The ore in transit, \$1,048,864; and accounts collectible, \$29,400; total \$6,454,423. After deducting amount due to Northport smelter, \$278,838, leaving an estimated value of \$6,175,585 for the Hercules property as of October 28, 1916.

Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel?

A. By assuming that it would go as deep as the neighboring mine, the Tiger.

Q. How deep does that go?

A. It was sunk to a depth of 2200 feet, but it was not profitably operated below.

The valuation includes the mine, ore in transit and accounts collectible. I did not take into consideration the Northport smelter and Pittsburg refinery as an asset.

They had no realizable value because at the end of operations of the mine they will be valueless; part of the machinery may be sold for 10 or 15 or 20 per cent of its cost but this is all that can be sold, and the same is true of the smelter. The original investment in the smelter was half a million dollars, and as testified here, it was bought for \$80,000. I gave no value to the mining stocks because there is no known value, they are purely speculative. One sixteenth of the total value is \$385,974. The payment of this sum in dividends spread equally over a period of 9.4 years is equivalent to the payment of the whole sum at the end of 4.7 years. The present value is the sum which at compound interest would amount to \$385,974 in 4.7 years. On a six per cent basis it would be \$293,405.

Q. That is based upon a lump payment of the sum of the whole purchase price at once, is it, Mr. Burbidge?

A. Yes, that is discounted.

The court: I think we understand that. That is the present value?

A. Yes, sir.

CROSS EXAMINATION

The present value is the present value on October 28, 1916, from a sum payable over a certain period of years. When I say the present value I don't mean the value today, if I had discounted the \$6,175,000 and divided by sixteen you would have had what you are seeking, it would be \$5,694,480; that is the present value of the sum of \$6,175,385 distributed over 9.4 years.

Q. There was \$1,048,864 of ore in transit. That was equivalent to cash?

A. No, it was not, pardon me. Ore will always be in transit as long as the mine is in operation.

That particular lot of ore will be settled for but other ore

will always be in transit. The cash that was on hand (\$649,359) whether that is larger than the usual balance or not I don't know but I do know that a mine operating as that does on such a large scale must necessarily carry a considerable cash balance. In arriving at the cash value have got to assume that the ore that was then outstanding and in transit has got to be distributed over 9 years, or the period I assume for the life of the mine, and I say the same thing about the cash on hand. Toward the end of the operation it would require less perhaps to carry them along. The amount of ore in transit would get less but in the main it will be nine years before the amount of ore that is in transit is capable of distribution to the owners. I got the information that there was 50 feet of ore above the No. 5 tunnel from Mr. Day and the foreman. It was in the stopes above the No. 5 tunnel. There were three chutes of ore and they gave me the intimation it was the equivalent of a depth of 50 feet in these chutes. These chutes were in the aggregate of between nine hundred and a thousand feet long. The main chute had a width of from 12 to 15 feet, what they call the middle chute has a width of about five feet and the east 3 1-2 or 4 feet. This was given me by Mr. Welch, the foreman. My method did not require the estimate of the width, it was strictly one of proportion on the assumption that the remainder of the mine would produce ore of like value to the proportion already worked. In estimating what was left I considered 50 feet above No. 5 and assumed then a solid plane of ore on down 1950 feet. I had the facts as to the ore before already worked out, and it was on this basis that I calculated or estimated the output of the remainder of the mine. I assumed that this ore in going down this 1900 feet went down at the average width and average length that it was in the fifty feet. I calculated the tonnage in the 50 feet. It would take me ten minutes. I assumed that below it would be of like productiveness to

the area stoped above. It was simply a question of yield per foot of vertical depth. I made no estimate of the tonnage at the 200 below No. 5 and then another 200. I don't have the average profit for the year of 1916. I have for a period. I didn't work out any year. For 1916 would be a little over \$9 a ton. For 1915 a little less than \$5 and for 1914 between \$8 and 9; 1913 about \$8, and 1912 a little less than \$4. Roughly the tonnage in the 50 foot depth above the No. 5 level was 60,000 tons, counting 9 cubic feet to the ton, I give a width of 15 feet for the main ore shaft, 5 feet for the middle one and 4 feet for the eastern one. I saw stopes and the drifts below No. 5 at the 200 and 400. They were working to the east and west limits of ore bodies on these drifts; they had reached the limits of the ore bodies. I found a shortening of about 100 feet in the western ore chute on the 200 level and on the 400 level the easterly chute didn't appear at all. It appears to have cut out somewhere between 200 and 400. On the sixth the drift had not yet penetrated the full extent of the ore, it was still in ore. The main chute has an average width of approximately 15 feet on the two hundred; below the two hundred, on the four and six hundred it is not quite so wide, it is about 12 feet; I estimated it, measured it with the eye. I took no measurements while I was there. The ore that came out in November and December, 1916, and January and February of 1917 possibly worked a little greater profit than \$9 per ton. I know the price of lead was higher and silver was somewhat higher. It cost about 25c per ton more through the shaft to take out the ore than it did through the tunnel.

The Standard Mammoth was worked 2025 feet, the Hecla 1600 feet, the Frisco 2200 feet. In taking 1900 feet, that is the depth at which the Tiger mine which is the nearest operating mine to the Hercules, ceased to be profitable; it was sunk to 2200 feet but was not profitable at that depth.

I did not assume any length or width in the vein. I as-

sumed a uniform production per foot of depth below the No. 5 tunnel as had been obtained above. If you get 100,000 tons of ore out of 100 feet, it is a 1000 tons per foot. (Tr. 889-921.)

REDIRECT EXAMINATION.

Abnormal prices have ruled for lead in the last two or three years. The normal price of lead over a period of over 30 years is \$4.32 1-2. In 1916 the price was \$6.83. That is the reason the profits in 1916 were so large. Also under the stimulus of that high price the mine had exerted every effort to increase its output and had produced larger tonnage. The cost of production in 1916 increased 90 per cent. over 1910, and today there is still further increase. The price of lead is now \$6.25 per cwt. as compared to \$6.83 last year. With the increased cost of production none of the mines of the Couer d'Alene district today are any better off, if as well off, as they would be under normal conditions with lead at \$4.25. I went down to the 600 level and made a sketch of the ore production of the level from the 500 down. The sketch is marked defendant's exhibit 54. The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it, that we are safe in assuming that it will be the same length, 500 feet. The middle stope has a length of about 225 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake to the east, in this direction. The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It is quite evident that at some step very little below the 600 level it will merge in the west stope. The east stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut

out or merged in this middle stope. And there is very little doubt that the middle stope will also be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot. That will be approximately 500.

Q. On this west stope, where you say in 800 feet they will merge and be one stope there—will you kindly take the length of it as it appears on the No. 6, and give us the tonnage on a 50-foot width or depth of it. I wish that for comparison with the 50-feet as on the No. 5 tunnel level.

A. That would give a tonnage of 33,333.

The ore chute at the 600 averages 12 feet in width as compared to 15 feet on the No. 5 tunnel level. I have the authority of Mr. Hoover's Principles of Mining as authority for writing off the equipment expenditure, etc. He says "Equipment expenditure, however, presents an annual difficulty, for, as said, the distribution of this item is a factor in the life of the mine, and that is unknown. If such a plant has been paid for out of the earnings, there is no object in carrying it on the company's books as an asset, and most well conducted companies write it off at once."

He is also authority upon the subject of estimating the depth of mines as compared with the depths of other mines. He says: "Mines of a district are usually found under the same geological conditions, and follow somewhat the same habits as to extension in depth or laterally, and especially similar conduct of ore bodies and ore shoots. As a practical criterion one of the most intimate guides is the actual development of adjoining mines."

This is recognized authority. Mr. Hoover is recognized as one of the bright particular stars of the mining profession. He is the man who is starving us; he is the man who is Hooverizing us.

(Tr. pp. 922-927.)

(Here follows testimony with reference to a sketch which

is not before the writer of this brief, and is not referred to further.)

I assume they will extract so many tons of ore per year in the future. Let us suppose they had worked out a thousand feet in depth in the mine and had produced a hundred thousand tons of ore, that would be one hundred tons for each foot.

Most ore bodies are lens shaped, of course, not round, necessarily, but irregularly lens shape. There must necessarily be some horizon where the ore shoot is longer than on others, and there must also be, somewhere about that and somewhere below it, horizons where it is shorter. All ore shoots in their depths peter out gradually, unless they are cut off by a fault. This one, unless it is cut off by a fault, will peter out bit by bit, so that at the depth assumed it will be very much smaller than it is on the—I mean to say that on the doctrine of probabilities the yield per foot of depth will be the same below as it has been above. In arriving at my figures I take the average profit from 1908 to 1912, because that period was a normal period, and I omitted 1906 and 1907 because they were boom years, and I omitted 1913, 1914, 1915 and 1916 because they were boom years. *I have the average profit for the ten years preceding October 28, 1916, that is, 1906. to 1916, eleven years, the average was \$6.04. To assume that fact the effect would be to necessarily increase it. It would practically double the value. The average profit for the whole life of the mine up to October 28, 1916, is \$6.70.*

I would like to attach an explanation to that, that in the first few years there was nothing shipped but sorted crude, crude ore, having a value of \$50 or \$60 a ton. There was mined at that time a considerable tonnage of lower grade ore, the milling ore, but there was no mill on the property, and that ore was simply kept in the mine or on the dump, awaiting the milling facilities. The showing of profits

there, therefore, applies to a tonnage smaller than was actually mined.

That is the reason I would exclude those years. By normal conditions I mean average conditions, conditions as they existed before 1912 and 1913. I am assuming that the price of ore is going down again, going to return to that price; it has already started down. An engineer figuring on the value of a mine would be a very unsafe man to follow if he estimated the value of the ore to be produced over a period of years upon a temporary boom price. I should have measured up the width of the stopes. That is about the only thing which I would do which I did not do in this particular case, and the reason I did not do it in this case, is that my view of the correct method of determining the value was to assume a like production for the future of the mine to its past.

Q. Outside of measuring the stopes that you saw there, did you mean to tell us that you would advise either a sale or a purchase, according to your client's side of the question, upon these figures that you have given, and upon the investigation you have made, and the attention you have given to the subject?

A. I should necessarily verify all the statements made to me as to production.

Q. Yes, I know, but assuming the correctness of the answers to the interrogatories?

A. With that statement, that the data that I used was correct as furnished to me, I should make no change in my estimate of its value.

TESTIMONY OF HARRY L. DAY

The witness testified to a life in the mining business (Tr. p. 970 et seq.) and gave to some extent the history of the Hercules mine, and as follows:

In June, 1901, we struck the ore in the No. 2 level. *It was fine ore; it was the nicest ore that had ever been found in the Couer d'Alene up to that time, high grade carbonates and galena carrying good values in silver.* I was superintendent until the latter part of June, 1912, a period of ten or eleven years. I originated the method of accounting and installed it, you might say, with the accountants, giving a monthly statement to everybody. I kept up an interest in the property. In my judgment and in my belief based on my knowledge of the mine and of business conditions and of general conditions prevailing at that time, I believe that the price paid was a very large price. I felt so at the time, and in fact was very reluctant to go in on the deal, and as a straight proposition I wouldn't go in on the deal, but there were other conditions that influenced me. The scope of our business had extended into the smelting and refining end of it, with attendant complications, and I considered it advisable that the interests of the property should remain intact as far as possible. This was not our first venture in the smelting business. We had been part owners in the Selby smelter some years before, and owned a considerable interest, and without any warning and against a gentleman's agreement with the other owners and stockholders, they sold out to the Guggenheims practically over night, and we were obliged to sell too; that is, in that sense of the word, that we did not care to remain with less than a ten per cent interest, with such powerful people in control of ninety per cent. We made a strenuous fight to stop the sale, but we could not accomplish it. Mr. Folsom and I went down there as soon as we got word. And we finally concluded to sell and take our profits. We made a good profit on it.

And there was another idea in my mind, too, and that was more or less of a sentimental one. The Hercules was our child, our career. It had been a family affair from the very beginning, and we were all very proud of its prosperity, and

our partners were very agreeable, and it occupied a position, I think, unique in the records of mining, and it had been prospected, developed, operated and handled as a mining, milling, smelting and refining proposition by the people who had originally located it, and their associates. And there was a certain feeling with me in regard to the property of staying with it until it was worked out. That had always been our idea, that we were not stock jobbers or speculators. The property had never been incorporated or stock-ed, and we only expected to get our money back out of the ground and we had no other idea in sight. So that I considered that under all the circumstances that the price paid was a large price. And I considered also other conditions. A certainty, the practical certainty of the enactment of workmen's compensation legislation, which would add a certain amount of charge to the operations of the mine. The fact that a gigantic world war was on, raging in three continents, and the absolute certainty or moral certainty that this country would sooner or later be drawn into it, and with its attendant obligations and also that physically the proposition that the butt end of the mine was behind us. We had mined out more than 2,000 feet of the stoping ground, and experience in the district showed that very few of the mines in the district went down over 3,000 feet, or as low as that. That we were at a critical period of the mine's operation in that we were leaving the hill diggings, the tunnel works, and taking up shaft work, with its attendant complications and expense. There were also some other matters which influenced me in the way of my previous experience in the property, the possibility of a reoccurrence of a porphyry dike, which showed very distinctly in the upper workings, No. 1, No. 2 and No. 3, and which was also a source of apprehension to us as tending to cut off the ore. This porphyry dike was secured into that property. It is a calcareous rock, or bird's-eye porphyry, as it is called by the miners. I always

had in mind, of course, the natural tendency and the natural history of the ore bodies in the district to get baser with depth. The life of a mine, of course, can be described by a crescent or semi-circle, it has its infancy or location, its youth, or period development, its adolescence or its period of extraction, which is followed by a gradual decline practically in the same ratio. The ore bodies shorten up, they get narrower, they get baser, or the values diminish and the property gets poorer with depth. And this scale of operation extends to all the factors in the property. You get less mill dirt, to the mill, you get less ore in transit to the smelter, you get less cash on hand, till the property dies a natural death. You have nothing left but your plant equipment, which is valuable only for what salvage can be gotten out of it. I have particularly in mind a property which I had to do with during my experience with the Federal, the Frisco property, which was worked more or less continually for a period of about twenty years or more, and which was left with a large milling, hoisting and pumping and steam plant, and the Federal people were only able to get for all of this machinery and equipment on the surface one hundred and fifty thousand dollars, including a valuable water right. The Tiger property at Burke, the nearest developed property, had been mined 2,200 feet below the collar of the shaft, and had only paid about 1,800 feet below. It had also been left with a large mining and milling equipment, and some of that had been saved by transferring it to the other properties of the Federal company, but the most of it was worthless, and they finally dismantled it and pulled it down after paying insurance and taxes on it for ten or twelve years. The Marsh property, which was just across the gulch from the portal of the Hercules No. 5, was mined more or less, and I think it was down at that time about 900 feet below the collar of the shaft. I looked at it one time on behalf of the Federal, and found that the ore shoot had raked within the ledge some-

what to the west, and a considerable portion of it then within Federal ground. Some litigation was then contemplated. In fact, we served notice on the Marsh that they were within Federal ground, and that they proceeded at their own risk. Litigation was avoided by a consolidation which was affected after my time, but the Marsh time has spent three-quarters of a million or a million dollars, and had got back four hundred thousand. Their operation was attended with a large loss.

A. Well, it is the nearest property to the Hercules, recently developed; that is, young property. The Hercules is in that neighborhood. And further down the gulch the Standard-Mammoth shaft and workings, and still lower down the gulch the Black Bear, Frisco and Gem. The Gem had rich ore in the upper levels, the finest ore in the country at that time. It only went down 400 or 450 feet below the collar of the shaft. And the Frisco went down about 1,600 feet, but it did not pay all of that distance. The Black Bear was an easterly extension of the Frisco, and afterwards consolidated with it, was mined in the early days on the tunnel level, but without any appreciable amount of profit that I remember. It was so long ago that it was abandoned and shut down, but I think there was a small shaft put down there, but it did not amount to much. I think that covers about all the properties on the canyon in the immediate vicinity. The Standard and the Mammoth combination or consolidation was the largest operating property there, and in considering the possible limits of depth of the Hercules I compared it with that, to some extent.

CROSS EXAMINATION.

Q. At the time that you joined your brother Eugene in taking up this option, and likewise previously, when he first mentioned it to you, you knew that he had been administrator of the estate of Damian Cardoner, deceased?

A. I did.

Q. And I assume you did not know the date of his final discharge?

A. No, I did not; I did not pay any attention to it, except in a general way. Mrs. Cardoner had brought it to my attention once, and possibly twice.

Q. And you knew, of course, of Mr. Cardoner's relations to the property in his lifetime?

A. Very intimately indeed.

Q. And her having obtained that property by descent from her husband?

A. Yes, I knew it as a matter of public knowledge.

Q. I suppose you knew about your brother's relation to the property as partner and at that time manager?

A. Certainly. He had always been partner, and he had been manager for—well, about six years, I think—no, not quite that long.

Q. Whatever it was, you knew about it?

A. Yes.

I don't believe there is any human being can fix the value of property that is out of sight in a fissure in the earth. I always depend on my own experience myself. *The value is best reached by one who is personally and best familiar with the operations, the previous operations of the particular mine, and I think by one who is acquainted with the mines and mining operations of other mines in the neighborhood. He wants to know what he is doing.* I have known some mining engineers right in this country, three of them, good men, to get as wide apart as the poles. *It can best be determined by men who understand the business, of necessity, and the greater familiarity one has with a particular district the better position he is in to express an opinion and form a judgment.* I am familiar with the Hecla in a general way; haven't been in the Hecla mine for a great many years. I

think the shaft went down probably 1,200 or 1,500 feet below the collar of the shaft. These shafts are all some distance above the creek level, 75 or 100 feet or perhaps more. I heard that the ore bodies showed an indication of narrowing; recently they discovered some new ore in their eastern workings and some new ground in a new part of the mine. In some of this property there was good ore quite deep and in others the ore was barren, got barren as they went down. The ore bodies narrowed in the Hercules as it went down. I didn't examine any other properties except the ones that I was interested in particularly. The history of the mining camp is that the bodies narrowed as they went down. I had in mind in making that statement the Tiger and the Poor Man. I think the Poor Man went down 900 feet. It is right across the creek from the Tiger at the upper end of the Burke within a stone's throw of the No. 5 portal of the Hercules. I had looked at the Marsh and the indications that I found there were very unfavorable. In my direct examination I spoke of the ore shoot raking to the west. At the east end it was very narrow, and at the west end it was wider. I think the entire shoot narrowed. The Green Hill Cleveland had narrowed before the 1450, it had narrowed some, and it kept getting narrow as it went down and the ore kept getting leaner until finally between the twenty and twenty-two the ore cut out all together. I meant 1450 below the collar of the shaft and about 100 feet above the creek level. The shaft was the deepest shaft in the district and it was one of the oldest mines there. I had in mind the Gem; it pinched down to just a stringer of ore at 400 or 500 feet; think there was about 16 inches of vein in the bottom of the shaft when they quit. I had in mind the Hummingbird. It had a vein showing on the upper level and a large amount of work was done there and that really shut out the showing, and the more development work they did the less they had in sight, and finally they had to quit, at or about 1,500 or 2,000 feet

below the upper working, they were away up in the mountain. I had in mind the Black Bear; they had a pretty good showing up above and opened up their ledge down below and it was so poor that we would not consider taking a bond on it. They had a good vein but no commercial values that I could see. My recollection is that all of the ore shoots shortened in length more or less. I had in mind a property over in the Saltes district called the Bryan. The ore which was good above turned to iron below. They shipped a little ore, I believe. They had some fine ore in the upper workings. I think I have given you a pretty good list.

What I meant to say was this, that I was more or less familiar by examination or by information or observation with these various properties that I have mentioned, most of them by personal examination, and some of them I worked in as an employe, and some I visited as an officer of the company, and some just from curiosity. And I meant to say that from that experience, from that knowledge, I used my judgment in estimating the value of the Hercules at that time.

The value of the Hercules mine on October 28, 1916, is all together in the judgment of the buyer. The value for a mine, as I apprehend, is what you take out of it after the mine is worked out. As to the fair market value of the Hercules on the 28th of October, 1916, I think the price paid was a very large price for the interest. I think anywhere between the price paid and four million dollars was a reasonably fair price. If you were to eliminate the cash on hand and the ore in transit, bills receivable and that class of things, just looking at the mine as a mine, together with the equipment, mill and refinery, it wouldn't make any substantial change in the price. The thing has got to be considered as a whole without the ore; the smelter and refinery are negligible assets, and without the smelter and refinery the mine is seriously crippled.

Q. I am asking you to assume the mine as it stood, with its total equipment, with its smelter, and with its refinery, as it stood on the 28th of October, but exclude its outstanding assets of cash on hand and amounts due on ore that had been shipped.

Mr. Babb: The same objection as before.

A. I can only say, Mr. Graves, that it all rides together. I think I would have deemed a fair price the amount that was paid less whatever could be gotten for these assets.

(Tr. p. 975 to 994.)

TESTIMONY OF JEROME J. DAY.

I consider the price paid for Mrs. Cardoner's interest in the Hercules too large. I take into consideration the information conveyed in the statements transmitted to me and the general information of the Couer d'Alene district as to what other mines in that district had done. I had in mind particularly the performance of the Standard Mammoth, the Frisco and Tiger-Poor Man. They are practically on the same hill or in a continuation of it. I considered the depth at which they had been worked and at which they had ceased to pay.

(Tr. pp. 1001 to 1004.)

(The witness testified to numbers of mines that had been failures in the Couer d'Alene district.) The business of the Hercules Mining Company and that of the smelter at Northport are separate and distinct the same as if they were a custom smelter. They would buy any other ore. It is taken account of on the books in that manner and settled for in that manner. The estimate of cash on hand of \$600,000 in dividing with Mrs. Cardoner was made when we had not settled with the Northport smelter. A final settlement was made in which the mine was found to be indebted to the smelter over \$200,000. The estimate of \$600,000 cash on hand was

an over-estimate by the sum they owed the Northport smelter.

(Tr. pp. 1010 to 1012.)

MR. SMITH: Q. Based upon your general knowledge of mining conditions in the Couer d'Alenes, and especially in this Burke section, will you state whether in your opinion the price which your brother, Eugene R. Day, paid to Mrs. Cardoner for her interest in the Hercules mining claim and all the properties, was a fair valuation or less than a fair valuation or greater than a fair valuation, and state why?

A. Based upon such information as I had, I believe it to be a large—or greater than its real value.

This is substantially all the testimony, not given in full, but given in substance, of the defendants as to the value of the Hercules mine. The plaintiff introduced the testimony of W. Earl Greenough (Tr. pp. 1032 to 1124). He was an expert engineer, and by substantially the same process of reasoning, except that he estimated the tonnage and value by the ton of the ore to be taken from the mine, he arrived at a value of \$10,750,000 for the Hercules mine (Tr. 1059). He did not take into consideration either the cash on hand or the ore in transit in making his calculation, or other properties. In arriving at his values he testified as follows:

By assuming these maps and the answers to the interrogatories as substantially correct, and I based my opinion on those facts or those disclosures. The No. 5 level at that time was apparently the lowest level to which they had opened the west ore shoot, the middle ore shoot, and the two eastern ore shoots, so that in arriving at the tonnage I take as a basis the tonnage so computed in one vertical foot of ore at the horizon of the No. 5 tunnel. In making this calculation I took the lengths as given on the map by Mr. Anderson, and I took the width as given by Mr. Burbidge. And on that basis the west ore shoot would have a length of 325 feet by

a width of five feet, or giving a total of 1,625 square feet. Likewise the middle ore shoot would have an area of 9,450 square feet; likewise the No. 1 east ore shoot would have an area of 800 feet, and the No. 2 east ore shoot an area of 880 feet. This gives a total of floor or stoping area on this No. 5 tunnel level of 12,775 feet. And I assume nine cubic feet as equal to a ton of ore in place, and dividing that—first I multiply that area, 12,775 feet, by one to get it one foot in depth. That reduces it to volume. And then I divide by nine cubic feet, and that gives approximately a little over, but approximately 1400 tons for each one vertical foot of that mine at that elevation. Then, on the 28th day of October, 1916, the ore developed above No. 5 tunnel they have stated was equal to fifty feet. At 1400 tons per foot that would be equal to 70,000 tons. The ore being developed between No. 5 and the 400 level would likewise be computed to equal 560,000 tons. The ore expectant between the 400 level and the 1600 level or 1500 feet below Canyon Creek is 1,680,000 tons. I assumed in making that tonnage estimate that this mine would be profitable at least to a depth, that is, ore shoots would go to a depth of 1500 feet below Canyon creek as gained by experience in that district. Now, to arrive at a fair value of a mine in that way there are several facts enter in, and I wish to exclude the particularly rich ore at the beginning of the operations, and I also wish to exclude the high prices prevailing during 1916. So that in my estimate I take an average of the price for the ten-year period, 1906 to 1915, both inclusive. That average price I get from answer to interrogatory No. 13—or I did not get the average price there, I should say I got the value per ton was \$5.17, and for this same period of ten years the average price of silver was 57 cents an ounce and of lead \$4.56 per 100 pounds, which is but one cent per hundred pounds higher than the average price of lead for 42 years prior to 1913. So that I assumed that, it only being one cent difference there,

that that average is a fair average, \$4.55 per 100 pounds. It is true that as we get down on these ore bodies they do become somewhat baser, more zinc comes in and more iron, and generally there is a gradual decrease in the silver ratio, that is, the amount of silver for each unit of lead. To get at about what that would amount to I have made certain estimates. At the beginning of this ten-year period the mill feed carried a ratio of 9.4 ounces of silver for each ten per cent lead content, and at the end of the period the mill feed carried a ratio of 8 ounces silver for ten per cent lead, so that the average silver ratio for the period would be 8.7 ounces for ten per cent lead. This is but a decline of 7-10th of an ounce below what it was at the beginning of the period. At 57 cents per ounce this decline is equal to 40 cents per ton of ten per cent ore. The ten per cent ore is slightly less than what the average of the mill feed has been. It has been around 11, I think. Allowing for this same ratio in decline of silver ratio below No. 5 tunnel, and allowing increased working cost by virtue of future operations being through the shaft of 15 cents per ton, and for a baser or lower grade ore of 42 cents, I consider \$4.50 as a fair value per ton of the ore as may be expected to be extracted from below No. 5 tunnel, to a depth of 1600 feet, which, as I stated, by previous experience and collateral evidence, would seem at least a reasonable depth. Now, since the supply of 70,000 tons of ore above No. 5 tunnel was equal to only three months run at the then rate of 22,000 pounds per month production, I would give that particular tonnage a value equal to that realized from the preceding ten months, namely \$9.39 per ton. Then, on the basis of \$9.39 per ton for the ore above No. 5 tunnel, and \$4.50 per ton for ore below No. 5 tunnel, the value of the Hercules ore shoots developed and indicated on April 28, 1917, would be—value of ore developed above No. 5 tunnel, \$675,000; value of ore being developed between 400-foot level and No. 5 tunnel, \$2,520,000;

value of ore expectant below 400 level and the 1600 level, \$7-570,000, which gives a total of \$10,750,000. In my opinion this would be a fair estimate of the future earning value of the mine, and I would look forward with confidence and reasonable assurance that the ore shoots will yield this profit.

Q. Now, in that estimate, do you take into account anything for cash on hand, that date?

A. No. You did not ask me that. I don't take into account cash on hand or ore in transit or book values. I merely made an estimate of the value of that indicated tonnage.

(This estimate was apparently based upon the proposition that the mine would be worked out in 13.7 years (Tr. p. 1103). The witness was asked to make estimates of present value but it doesn't appear in evidence that such estimates were introduced (Tr. pp. 1101-1103).

From the foregoing testimony, can it be said as required by the rules of law with reference to confidential and fiduciary relations, that the testimony is clear and convincing that the Hercules mine, including its property and \$1,048,-864.14 due for ore sold, was not of a greater value than \$5,-000,000?

The estimates made by the engineers, being widely variant, were excluded practically from consideration by the trial court, and he substantially bases his decision upon the bare estimates placed upon the property by the interested parties, the Day brothers. We believe the testimony of the engineers, when properly considered, not taking their final opinion, but their method of estimating and reasoning should be made the basis of determining whether or not a fair value was paid for this mining interest.

Mr. Burbidge, witness for the defendants, showed ability as a mining engineer and good reasons for his estimates of the quantities of ore (though not as practical as Greenough) yet remaining in the mine. The fallacy of his argument in

estimating something over six million dollars for the value of the mine is so evident that it doesn't require an expert to discover it, and our argument as to value will be largely based upon the expert testimony of Mr. Burbidge, which, when properly considered, is supported by that of the plaintiff's witness Greenough.

The reasoning of Mr. Burbidge, upon which he bases his value of the Hercules mine, as of October 28, 1916, is erroneous in the following particulars:

(a) He bases the value of lead and silver on certain years, which he says were "normal years," these in fact being the years of low prices largely and the fewer years during the previous life of the mine, whereas in determining prospective values an average of the prices prevailing for a period of the same length prior to the date upon which the calculation is based as is estimated for the future life of the mine would be reasonable, and basing the future life of the mine upon the testimony of Eugene R. Day and Mr. Burbidge of approximately ten years, then the average prices for the previous ten years should be taken for determining values. The contention that during the year 1916 abnormal prices prevailed on account of the European war and should therefore be excluded is not according to either reason or engineering judgment for the reason such conditions actually existed at the time and in so far as human judgment could discern would continue for at least a reasonable time in the future. It is a matter of public knowledge that it was the general impression on that date that the war would not end for some years. According to Mr. Burbidge's testimony the average net profit per ton for the ten years preceding October 28, 1916, was \$6.04, whereas Mr. Burbidge bases his calculations of the value of the mine on a net profit of \$3.00 per ton (Tr. p. 904). This testimony that the value of the mine would be practically doubled if it was based upon the average net profit for the previous ten years was correct.

He also said the average net profit during the previous life of the mine was \$6.70, which, if taken as a basis, would increase the value of the mine to more than double his figures, that is, to \$10,556,520, not counting cash and ore in transit.

(b) However, there is in our judgment another serious error on his part, and that was his failure to include the ore shipments from 1901 to 1905, inclusive, on the ground, as stated by him, that it was selected ore, and the low grade was thrown aside and kept for milling purposes. This is obviously wrong in theory, for the reason that the low grade ore was subsequently milled, shipped and counted in his averages of later years when milling facilities were obtained. He should therefore have based his calculations of ore contents upon the tonnage of all the years since the mine was opened. Calculating the average profits upon this basis, we find an increase to \$7.57 per ton, which would give a value of approximately \$11,000,000 instead of \$4,726,800.

(c) The testimony of Eugene Day shows that the Hummingbird tunnel was driven about 100 feet above the Canyon Creek level, and that there was approximately 50 feet of ore above the Hummingbird tunnel, altogether estimated by Mr. Burbidge as 1,950 feet of ore still remaining in the mine, from which he estimates that there remains in the mine 1,575,600 tons, which, at \$6.70 net profit per ton, would be \$10,556,520; added to this the \$649,359 cash on hand, \$1,048,864 of ore in transit, a total of \$12,254,726 would be the result; from which take \$278,838 due to the Northport smelter, would leave a balance of approximately \$12,000,000 in values deduced from his figures, changing only the basis upon which he figured values. This is a fair basis, as the mine was sold in the very apex of high prices, and it could well be assumed that the average of the previous sixteen years would prevail for the next ten years.

(d) Then another error apparent in Mr. Burbidge's figures is that his estimate is based upon the supposition that

an equal amount of ore will be mined each year until the mine is exhausted. This, of course, the evidence shows to be erroneous, as when the peak of development is reached there will be a gradual decline in ore production until final exhaustion. As an example, it appears from the testimony that there was produced in concentrates and crude ore in 1916, up to the 28th of October of that year, 70,026 wet tons, which included 20,400 tons of crude ore shipped and 231,568 tons of wet milled. From this it will be seen that about one-sixth of the tonnage estimated to be in the mine by Mr. Burbidge was actually mined during the first ten months of 1916 and this testimony shows that more was mined in 1917. There might be one of two conclusions; first, that there was a very much greater deposit of ore than estimated by Mr. Burbidge, or else the facilities for working are such that it will not take over half the time estimated by him in working out the ore. In either event, the value would be much greater.

(e) There is still another error in Mr. Burbidge's calculations, and that is he based his calculations upon previous operations, when in fact several million dollars out of the net profits had been spent for development, machinery and equipment that would not have to be duplicated, and would necessarily in the future be a part of the profits. Of course, the additional cost of hoisting of perhaps 25 cents a ton would have to be calculated against this, which would be but a small item. The future profits undoubtedly would be some millions over previous profits on account of this saving.

The fact that the net profits for the year 1916 were more than \$3,000,000, as shown by calculations heretofore made in this argument, and that 1917 was a better year, show how erroneously the calculations of Mr. Burbidge are on mine futures.

From the evidence it appears that 1,638,715 wet tons had been milled up to and including October 28, 1916, and that

139,785 tons crude ore had been shipped, making a total of 1,778,500 tons of ore actually taken from the mine up to that time. The profits shown by the evidence to that date were \$11,915,886.74, to which should be added \$1,048,864.14 for ore in transit, which had not been paid for up to that time, making a total of profits to October 28, 1916, of \$12,964,754.88, or an average profit per ton of \$7.29. Mr. Burbridge estimates that there still existed in the mine on October 28, 1916, 1,575,600 tons of ore; figuring the same average net returns of \$7.29 per ton, a total value of the ore in the ground would be \$11,286,124. With the present equipment and facilities for removing ore, based upon the work done in 1916 up to October 28, the ore in said mine will be removed if it does not exceed the figures named by Mr. Burbridge within five years, and estimating it at five years and interest at the rate of six per cent, compounded, this amount should be discounted at said rate of interest for a period of two and one-half years. This would make the present value on October 28, 1916, of the ore then in the mine of \$9,758,272. To this should be added \$1,048,864.14 for ore in transit, and approximately \$400,000 cash on hand, which will total \$11,207,136.74 as the actual cash present value of the property owned by the Hercules Mining Company at the time the same was sold by Mrs. Cardoner to Eugene R. Day, in which she held a one-sixteenth interest, and which, from these figures, was of the reasonable value of approximately \$700,000.

While the testimony in this case shows that the ore will become to some extent baser as depth is reached, this will be neutralized from the fact that the largest expense connected with the operation of the mine in the nature of machinery and equipment, tunnels, smelters, refinery, mills, protecting property, saw mill, mines, machinery, etc., had already been paid for and deducted from the profits, has already been met, as the mine is now thoroughly equipped for all future

development and paid for out of the profits of past production.

Of course, any value that any man desired to put on this property can be estimated merely by valuation of the ore. If he wishes to estimate the value low, he will base his estimation on so-called "normal years." If he wished to estimate it high, he would take the so-called "boom years," as that of 1914, when it paid more than \$9 a ton; but it seems the middle course is the proper course to take, and estimate it according to the average value of minerals for the previous life of the mine. Mr. Burbidge bases his opinion on the values for 1908 to 1912, the very lowest of the sixteen years, although at the time the mine was sold the prices received for products were practically the highest known, with a world's war raging and the prospect for the value of minerals to go still higher, with the prospect of after-war reconstruction of the destroyed countries, it would not take an expert to know that minerals would not decline in value to the low figures upon which he based his estimate. Whether it is proper for the court to consider the actual conditions for the last three years, we are not advised, but know that the general public knowledge about the values of minerals that is known to the court would justify the deductions made by Mr. Burbidge. The record shows (Answer to Int. 14, pp. 77 to 77) that the Hercules mine had received \$20,963,618.87 for ore, with net profits of \$11,915,886.74, to which should be added \$1,048,864.14 ore in transit and not accounted for, making a total of \$13,064,750.88.

Eugene R. Day, Allen and others in making estimates of the value of the mine, continually mentioned that the net earnings had been approximately \$11,000,000, \$2,000,000 too low.

It must not be lost sight of that this company has spent approximately one million dollars for property that is not connected with this mine and which has been paid for out of

the earnings of the company. This has been heretofore referred to in this brief. To be exact, \$949,469.11, and this does not include any of the expense, such as machinery, hoists, tunnels, timbering, shafts, cars, tracks, surface developments and property not enumerated in the above calculation that must have cost not less than a million dollars more.

It will be well here to revert to the actual value placed upon this property at the time of the sale. The value of all of the property of the Hercules company excepting the cash on hand, was placed at \$5,000,000. There was at that time ore in transit that would be paid for within sixty days amounting to \$1,048,864.14, leaving a value of the mine itself of \$3,951,135.86. Notwithstanding some fallacious arguments and testimony with reference to ore being always in transit, the testimony of the witness Burbidge shows that this more than a million dollars of ore in transit, which would be cash in a few days and possibly paid in dividends, together with all but \$250,000 of the cash on hand, could be distributed in dividends, and the business would continue without interruption. In other words, it is not necessary to have this amount of money tied up to carry on the operations (Tr. p. 1128). There was at the time of this sale practically \$1,600,000 in cash on hand, irrespective of the fallacious arguments that might be put up to show the necessity of this situation. This so-called ore in transit had already been sold. There is nothing to show in the testimony the amount of ore actually knocked down in the mine and ready to be delivered to the smelters or mills or already at the mills and not sold. Had the returns been received (and the testimony shows it would be received in a very few days), this would have been in the nature of cash in bank, and we assume it would not have been contended that it was necessary to have \$1,600,000 in the bank with which to carry on the business. As stated, the mine proper was valued at ap-

proximately \$4,000,000, just a little less. The testimony shows that more than \$3,000,000 net profit was taken out in 1916, as has been heretofore shown, and Mr. Eugene R. Day testified that the year of 1917 was a better year for the mine than 1916, which means that the Day family received approximately in dividends in the year of 1917 sufficient to return to them the whole amount of money paid to Mrs. Cardoner for her interest in the mine; certainly counting the two months of November and December with the year of 1917 all their money paid to Mrs. Cardoner was returned to them, or at least the net profits were sufficient to return to them the money so expended. Statements of the witnesses that the property was worth approximately what was paid for it is of but little value in the face of the facts that absolutely disprove such statements, and which show that when such statements were made the witnesses knew they were not true. We are basing this argument practically on the testimony of the defendants in the case.

We understand the great weight usually given to the decisions of the trial courts, but this court is not in any sense of the word bound by the findings of the district court in this case, as this case is tried *de novo* in the Circuit Court of Appeals. The assumption of values as made by the court was based apparently upon offers made and options given and interests sold many years before 1916. There was an offer made to Judge Wood, as the testimony shows, and as we have heretofore referred to, of one-sixteenth interest in this mine for \$1,600. Very naturally this would be of but very little probative force in establishing value for 1916, and while the values placed upon the mine in 1906, ten years before this transaction, was considered by the court as establishing value, there had been more than nine million dollars earned since these options were given, and still the mine was estimated to be of practically the same value, and according to our estimate it is now of more than twice said value. We

therefore say that the court committed a very serious error in attempting to base value on options given and interests sold many years before this occurrence.

The fact that the smelting business and the possibility of troubles from Spain gave her concern, only increases the responsibility of Eugene R. Day in seeing that she was properly advised. Under the law he was not authorized to buy the property at all unless he paid a fair value therefor, and then not until he had given her all the information he possessed. It is true she was not bound to keep her property; she could sell it if she desired; *neither was Eugene R. Day bound to buy the property, and if he did he was required by law to pay its reasonable value therefor.*

As the court stated, the margin of uncertainty may be great, but when it is considered that the mine had on hand a million dollars and was paying at the rate of three million dollars a year, or did so pay in 1916 and 1917, the margin of uncertainty was not so great that any reasonable person would know that the value of this mine was much more than four million dollars, and especially since the evidence showed that in 1917 there was more ore taken out at approximately the same price than in 1916. The cost of extraction was practically the same. The matter of marketing and turning into cash was not mentioned, but it is assumed that no trouble was had in that respect, especially on account of the war.

There are a great many suggested problems made by the court that were not in evidence and that Mrs. Cardoner hardly considered in selling her property. We do not believe there were any such uncertainties as the court thought and upon which the court seemed to have based his opinion. We do not count the testimony of the Days, interested as they were, of very great importance, nor that of Hutton. when it is considered that all parties estimated the life of the mine at not less than ten years and that in the one year of 1917 it must have earned over three million dollars.

It is easy enough for a witness to state property is worth so much, but in the face of the facts in this case, their testimony, according to our view, is worthless.

It is true that an approximation of the true value is all that is required, *but that is required*, as the court states. *Not only must it approximate the true value but this must be established by clear and convincing testimony*, as we will show hereafter by quotations from authorities, *and the burden of proof is upon the defendants. Have they met it and is this court satisfied that the testimony clearly and convincingly proves that the less than four million dollars basis value of the mine approximated near its true value?*

We call the court's attention to the following authorities:

"Where one partner seeks to purchase the interest of another he must in utmost good faith frankly and honestly inform the other of all he knows which affects the value of such interest:

Brooks v. Martin, 2 Wall. 70; 17 L. Ed. 732.

Reese v. Bradford, 13 Ala. 837.

Caldwell v. Davis (Colo.), 15 Pac. 696; 3 Am. St. Rept. 599.

Hopkins v. Watt 13 Ill. 298.

Rankin v. Kelley (Ky.) 173 S. W. 1151.

Minir v. Samuels (Ky.) 62 S. W. 481.

Pomeroy v. Benton 57 Mo. 531.

Burgess v. Dierling 113 Mo. App. 383; 88 S. W. 770.

Gilbert v. Anderson 73 N. J. Eq. 243; 66 Atl. 926.

Seal v. Holcomb (Tex.) 107 S. W. 916.

Yost v. Critcher (Va.) 72 S. E. 594.

Finn v. Young 46 Wash. 75; 89 Pac. 400.

1 Rowley on Partnership, Sec. 400.

One only has to read the testimony of Burbidge and Greenough to see that Eugene R. Day never disclosed to Mrs. Cardoner but little of the elements that went to make up the value of this mine. Had he acted in as good faith as

the law requires, he would have had his experts go into the mine, make the necessary measurements, make up full statements of all conditions as the court has required him to make in answer to interrogatories in this case, would have given the size of the ore shoots, have given a detailed statement not only of the conditions but of the possibilities of the mine and would have done this in writing so that she might have had the information for expert advice.

The author continues (Rowley on Partnership, Sec. 400) :

*"It is clear law that in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that unless such information has been furnished, the sale is voidable and may be set aside. (Law v. Law, 1 Ch. 140.) * * **

If the purchasing partner conceals any facts affecting the value of the interest purchased, equity will grant relief, and the sale may be set aside or the purchasing partner held to account for his profits in the deal (Nelson v. Matsch (Utah) 110 Pac. 865; Ann. Cas. 1912 D. 1242 N.), and the remedy of such partner is not affected by the fact that his co-partners purchased his interest not from him directly but from a third party to whom they induced him to sell, though not acting for them. * * * It was held in California, however, that when one partner authorized the sale of his interest, the relation between him and his co-partner was at an end, and the latter was not bound to make full disclosures when dealing with him. (Citing Wise Realty Co. v. Stewart (Cal.) 146 Pac. 534). This scarcely seems a just holding, nor in harmony with the general rule requiring good faith between partners."

Rowley on Partnership, Sec. 400.

“An even greater diligence and honesty devolves upon the surviving partner in relation to the property in case one dies.”

Rowley on Partnership, Sec. 403.

“The partnership relation is one of trust and confidence, and the members of a firm sustain a trust relation toward each other with reference to partnership matters. (Citing numerous cases.)

“Partnership is ‘Eminently a relation of trust, all its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly created entity—the partnership—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a *cestui que trust*—a trustee in so far as his own duties bind him; a *cestui que trust*, so far as duties rest on his co-partners.’” (Citing *Goldswill v. Eichold* (Ala.) 33 Am. St. Rep. 97.) * * * *“There is no stronger fiduciary relation known to the law than that of a co-partnership, where one man’s property and property rights are subject to a large extent to the control and administration of another (Citing Sollinger v. Sollinger (Wash.) 105 Pac. 236). Substantial concealment and misrepresentation are, as between partners, species of fraud which will not be tolerated.”*

See *Roby v. Colehour* 135 Ill. 300, 25 N. E. 777, Affirmed 146 U. S. 153; 36 L. Ed. 922; 13 Sup. Ct. 47.

Rowley on Partnership, Sec. 342.

“A managing partner will not be allowed to take advantage of his position to defraud a co-partner.”

Citing *Breyfogle v. Bowman* (Ky.) 162 S. W. 787.

Rowley on Partnership, Sec. 384.

IV.

The fourth issue into which we have divided this brief, for convenience, is as follows:

“Could the defendant Eugene R. Day purchase the property in question from the appellant, he being the administrator of the estate of her husband and said property being a portion of said estate, and was said purchase prohibited and void by the terms of Sec. 5543 of the Revised Statutes of the State of Idaho.”

We are not unmindful of the strong reasoning in the opinion of Judge Dietrich with reference to this phase of the case. His view is that the law of Idaho is only declaratory of the general law that has always existed in cases where the trustee buys property at his own sale.

The statute reads:

“No executor or administrator may directly or indirectly *purchase any property or estate he represents*, nor must he be interested in any sale.”

This proposition does not exist in the general law, but we understand the rule to be that contracts prohibited by statute are absolutely void and not voidable, as the court has determined in this case. This is a contract in violation of positive law and such contracts are generally held to be illegal.

It is said by the United States Supreme Court in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, that a contract made in violation of law is void, whatever may have been theretofore decided by the court to have been the public policy of the country on the subject.”

“An illegal agreement will not be enforced and hence is not a contract according to the definition of a contract.”

13 C. J. 410.

“As a general rule any contracts or agreements which involve or have for their object a violation of law are illegal.

“It is immaterial as far as the effect of the illegality is concerned whether the object of the agreement is forbidden by the common law or by statute, or generally speaking

whether the thing forbidden is *malum in se* or *malum prohibitum*."

13 C. J. 411-412.

It was said by the Supreme Court of the United States in *Cooper Manufacturing Company v. Ferguson*, 113 U. S. 727:

"It must be considered that if the contract on which the suit was brought was made in violation of the law of the state, it can not be enforced in any court sitting in the state charged with the interpretation and enforcement of the laws."

In other words, they held that the federal court sitting in a state could not enforce a contract in violation of that state's law.

The only question as we see it, is whether or not this property actually came within the purview of the statute, and not as the court seemed to conclude that the statute was merely the enactment of the general law as it had always existed.

It is said by the court that this property had passed out of the hands of the executor and had been distributed at that time to Mrs. Cardoner, and therefore he had a right to purchase it. This sale was made on the 28th of October, 1916, and he was discharged as administrator on November 1. As we conceive it, the object of the law was to prevent the administrator from dealing in property that ultimately goes to heirs about which he must have had more information than any other person and therefore in a position to defraud the heirs. Notwithstanding it had been distributed, we believe it was still a part of the estate in the sense of the statute and that he was not authorized to buy it and that any contract he made to purchase this property was not merely a voidable contract, as the court concludes, but is absolutely void, and if so it could not be ratified.

V.

The fifth issue under which we are presenting this argument is as follows:

“Were Jerome J. Day and Harry L. Day innocent purchasers each of an undivided one-fourth interest of the one-sixteenth interest in the Hercules Mining Company’s property sold by appellant to Eugene R. Day?”

2 C. J. 467.

“The purchase or acquisition of property by an agent without authority or in excess of his authority including all the terms and conditions, is ordinarily ratified by the principal’s accepting and retaining the benefits of such purchase or acquisition.”

2 C. J. 500.

In this case Eugene R. Day bought the property with a view of permitting his two brothers and sister to be jointly interested with him if they so desired. He was making a contract in their behalf which they might ratify or not, as they chose, as he was not authorized to make the purchase in their behalf. They chose to ratify the agreement, they themselves paid their own part of the consideration and became purchasers of the property which related back to the original transaction, constituting Eugene R. Day their agent. Under these circumstances they can not plead innocent purchasers.

CONCLUSION.

1. The testimony of the expert witnesses, Burbidge and Greenough, shows without the shadow of a doubt that Eugene R. Day did not disclose to Mrs. Cardoner the necessary facts within his knowledge from which she could form a just judgment as to the value of the Hercules mining properties.

2. The evidence does not show clearly and satisfactorily as is required under the law in such cases (the burden of proof being upon defendants) that the value of the Hercules mine and its properties, including more than a million dollars in ore, practically cash on hand, did not exceed five million dollars; but to the contrary, a reasonable estimate made from the testimony of defendants' witness Burbidge, an expert mining engineer, shows beyond a doubt that the value of the Hercules mine and its property, including the more than a million dollars in ore sold and not yet paid for, was of the value of not less than ten million dollars.

These matters having been established, or either of them, will bring this case within the prohibition laid down by the rule in *Brooks v. Martin*, *Supra*.

3. The burden of proof being upon the defendants to establish their good faith, full and fair disclosures, that the price paid was approximately the real value of the mine, they have failed to meet the burden of proof, nor was such satisfactory proof made.

4. The laws of Idaho made contracts whereby executors or administrators purchased property belonging to the estate of their decedent void, and Eugene R. Day was the administrator of the estate of Damian Cardoner, deceased, at the time he purchased such property, and although such property had been distributed he was still administrator of such estate and such void contract could not be made valid by subsequent ratification.

5. The introduction of the testimony with reference to the options given in 1906 and which the court considered as proof of value upon rendering judgment, was reversible error for reasons which have been fully stated in this brief.

It is respectfully submitted that under the testimony in this case it should be reversed and rendered in favor of the appellant, or else reversed and remanded for a new hearing.

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